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Report of the United Nations Commission on International Trade Law

Fiftieth session
(3-21 July 2017)

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Note

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the fiftieth session of the Commission, held in Vienna from 3 to 21 July 2017.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, the present report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

II. Organization of the session

A. Opening of the session

3. The fiftieth session of the Commission was opened by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Mr. Miguel de Serpa Soares, on 3 July 2017.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 14 November 2012, 14 December 2012, 9 November 2015, 15 April 2016 and 17 June 2016 are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Burundi (2022), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), Indonesia (2019), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kenya (2022), Kuwait (2019), Lebanon (2022), Lesotho (2022), Liberia (2019), Libya (2022), Malaysia (2019), Mauritania (2019), Mauritius (2022), Mexico (2019), Namibia (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 29 were elected by the Assembly on 14 November 2012, at its sixty-seventh session, one was elected by the Assembly on 14 December 2012, at its sixty-seventh session, 23 were elected by the Assembly on 9 November 2015, at its seventieth session, five were elected by the Assembly at its seventieth session, on 15 April 2016, and two were elected by the Assembly on 17 June 2016, at its seventieth session. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

(2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2022), Sri Lanka (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022), Venezuela (Bolivarian Republic of) (2022) and Zambia (2019).

5. With the exception of Côte d'Ivoire, Iran (Islamic Republic of), Kenya, Lebanon, Lesotho, Liberia, Malaysia, Mauritania, Nigeria, Sierra Leone and Zambia, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Albania, Algeria, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Estonia, Finland, Lao People's Democratic Republic, Malta, Myanmar, Netherlands, New Zealand, Norway, Portugal, Republic of Moldova, Serbia, Slovakia, South Africa, Sudan, Sweden, Syrian Arab Republic, United Republic of Tanzania and Viet Nam.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international organizations:

(a) United Nations system: International Centre for the Settlement of Investment Disputes (ICSID), UNCTAD, United Nations Industrial Development Organization and the World Bank;

(b) Intergovernmental organizations: Asian-African Legal Consultative Organization, European Bank for Reconstruction and Development (EBRD), International Cotton Advisory Committee, International Institute for the Unification of Private Law (Unidroit), Organization for Economic Cooperation and Development (OECD), Organization for the Harmonization of Business Law in Africa and Permanent Court of Arbitration (PCA);

(c) Invited non-governmental organizations: Advisory Council of the United Nations Convention for the International Sale of Goods, American Bar Association, American Society of International Law, Asia-Pacific Regional Arbitration Group, Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York, Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIARB), Comité Maritime International (CMI), Commercial Finance Association, European Law Students' Association, Factors Chain International and the EU Federation for the Factoring and Commercial Finance Industry (FCI and EUF), Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional, Hong Kong Mediation Centre (HKMC), Independent Film and Television Alliance, Institute of Law and Technology at Masaryk University, Instituto Iberoamericano de Derecho Concursal (IIDC), International Association of Lawyers, International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International), International Bar Association (IBA), International Chamber of Commerce (ICC), International Institute for Sustainable Development, International Law Institute, International Mediation Institute, International Swaps and Derivatives Association (ISDA), Law Association for Asia and the Pacific, Moot Alumni Association, National Law Center for Inter-American Free Trade, Russian Arbitration Association (RAA), Singapore

International Mediation Institute (SIMI), Stockholm Chamber of Commerce Arbitration Institute, Swiss Arbitration Association (ASA), Vienna International Arbitral Centre (VIAC) and World Association for Small and Medium Enterprises.

9. The Commission welcomed the participation of international non-governmental organizations with expertise in the main items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

10. The Commission elected the following officers:

Chair:	Mr. János Martonyi (Hungary)
Vice-Chairs:	Mr. Jorge Roberto Maradiaga (Honduras)
	Ms. Natalie Y. Morris-Sharma (Singapore)
	Ms. Kathryn Sabo (Canada)
Rapporteur:	Mr. Salim Moollan (Mauritius)

D. Agenda

11. The agenda of the session, as adopted by the Commission at its 1047th meeting, on 3 July, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Commemoration of the fiftieth anniversary of UNCITRAL.
5. Micro, small and medium-sized enterprises: progress report of Working Group I.
6. Insolvency law: progress report of Working Group V.
7. Technical assistance to law reform.
8. UNCITRAL regional presence.
9. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: CLOUT and digests.
10. Status and promotion of UNCITRAL legal texts and the New York Convention:
    (a) General;
    (b) Functioning of the transparency repository;
    (c) International commercial arbitration moot competitions;
    (d) Bibliography of recent writings related to the work of UNCITRAL.

11. Coordination and cooperation:

    (a) General;

    (b) Reports of other international organizations;

    (c) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups.

12. Relevant General Assembly resolutions.

13. Role of UNCITRAL in promoting the rule of law at the national and international levels.

14. International dispute settlement: progress report of Working Group II.

15. Possible future work in the area of international dispute settlement:

    (a) Concurrent proceedings;

    (b) Code of ethics/conduct for arbitrators;

    (c) Possible reform of investor-State dispute settlement.

16. Finalization and adoption of a model law on electronic transferable records and explanatory notes.

17. Electronic commerce: progress report of Working Group IV.

18. Legal developments in the area of public procurement and infrastructure development.

19. Possible future work in the area of security interests and related topics.

20. Endorsement of texts of other organizations: the Uniform Rules for Forfaiting of the International Chamber of Commerce.

21. Work programme of the Commission.

22. Date and place of future meetings.

23. Other business:

    (a) Internship programme;

    (b) Evaluation of the role of the Secretariat in facilitating the work of the Commission.

24. Progress report of Working Group VI (Security Interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions.

25. Adoption of the report of the Commission.

12. Several delegations expressed concern that agenda item 21 (Work programme of the Commission) had been scheduled for consideration at the end of the second week of the session, which would not allow sufficient time for its consideration before the adoption of the report on 14 July. Another concern, shared by some delegations, was that placing that agenda item after agenda item 16 (Finalization and adoption of a model law on electronic transferable records and explanatory notes) did not facilitate the presence in the room of State representatives in charge of the general

work programme of UNCITRAL. The alternative view was that the agenda item was scheduled in a way that would allow the Commission to have the complete information about progress made by all UNCITRAL working groups and views of delegates regarding proposals for future work before the item on the work programme of the Commission was considered.

13. Acknowledging that rescheduling the consideration of agenda item 21 at the current session of UNCITRAL would interfere with the travel arrangements already made by delegates and observers, the Commission decided to retain the scheduling of agenda items for the current session as announced in the provisional agenda (A/CN.9/894). It requested the Secretariat to schedule the consideration of the work programme of UNCITRAL at future sessions in such a way that it would accommodate the presence of relevant representatives of States and allow sufficient time for the consideration of that item. The Secretariat was also requested to be in close consultation with the Bureau of UNCITRAL on scheduling agenda items for future sessions. (See also chapter XIX, section C, below.)

E. Adoption of the report

14. The Commission adopted the present report by consensus at its1060th meeting, on 14 July, at its 1067th meeting, on 20 July, and at its 1068th meeting, on 21 July 2017.

III. Consideration of issues in the area of electronic commerce

A. Finalization and adoption of a model law on electronic transferable records and explanatory notes

1. Introduction

15. The Commission recalled that, at its forty-first and forty-second sessions, in 2008 and 2009, respectively, it had received proposals from States for work on electronic transferable records.[2] The Commission also recalled that, after preparatory work,[3] the Commission, at its forty-fourth session, in 2011, had mandated its Working Group IV (Electronic Commerce) to undertake work in the field of electronic transferable records.[4] The Commission further recalled that, from its forty-fifth to its forty-ninth session, from 2012 to 2016, it had considered reports of

[2] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 335, and ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338.

[3] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 245-247 and 250, and ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 232-235.

[4] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

the Working Group,[5] reaffirming its mandate and endorsing its decision to prepare a model law with explanatory materials.[6]

16. At its current session, the Commission was informed that the Working Group had completed its work on the preparation of a draft model law on electronic transferable records with accompanying explanatory materials at its fifty-fourth session (held in Vienna from 31 October to 4 November 2016). At that session, the Working Group had requested the Secretariat to revise the draft model law and explanatory materials contained in document A/CN.9/WG.IV/WP.139 and its addenda to reflect the deliberations and decisions at that session and transmit the revised text to the Commission for consideration at its fiftieth session (A/CN.9/897, para. 20). The Commission was further informed that, in accordance with the usual practice of UNCITRAL, the text of the draft model law as recommended by the Working Group had been circulated by the Secretariat to all Governments and relevant international organizations for comment.

17. At the session, the Commission had before it: (a) the report of Working Group IV (Electronic Commerce) on the work of its fifty-fourth session (A/CN.9/897); (b) a draft model law on electronic transferable records with explanatory notes (A/CN.9/920); (c) compilation of comments by Governments and international organizations on the draft model law and explanatory notes (A/CN.9/921 and Adds.1-3); and (d) a note by the Secretariat on proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission (A/CN.9/922).

18. The Commission proceeded with the article-by-article consideration of the draft model law together with the accompanying draft explanatory notes and related amendments proposed by Governments, international organizations and the Secretariat.

2. Article-by-article consideration

Article 1. Scope of application

19. It was suggested that an explicit reference to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)[7] (the "Rotterdam Rules") should be inserted in the footnote to draft article 1. It was recalled that the Rotterdam Rules enabled the use of negotiable electronic transport records and it was added that no other electronic transferable records should be issued under those Rules.

20. Noting that footnote 1 contained an illustrative list of items that enacting States could decide to exclude from the scope of their law on electronic transferable records

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[5] For the reports of the Working Group on the work of those sessions, see A/CN.9/737, A/CN.9/761, A/CN.9/768, A/CN.9/797, A/CN.9/804, A/CN.9/828, A/CN.9/834, A/CN.9/863, A/CN.9/869 and A/CN.9/897.

[6] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 90; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 230; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 149; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 231; and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 226.

[7] General Assembly resolution 63/122, annex.

while enacting it on the basis of the UNCITRAL model, some delegations did not object to listing transport documents issued under the Rotterdam Rules in footnote 1 as additional sub-item (d).

21. In response, it was indicated that one of the goals of the draft model law was to support the implementation of the Rotterdam Rules, and that suggesting an exclusion of the Rotterdam Rules from the scope of application of the draft model law might hinder that goal. It was added that the Rotterdam Rules and the draft model law were generally compatible. It was further indicated that a conflict could arise only with respect to interaction between the Rotterdam Rules and draft article 15, and that such a conflict, if it arose, should be dealt with in that specific context. However, it was also noted that other aspects of those two legislative texts could diverge. For instance, it was said that the notion of integrity of an electronic transferable record in the draft model law and the notion of integrity of an electronic transport record in the Rotterdam Rules were different.

22. It was also suggested that sub-item (c) in footnote 1 should be redrafted to refer to "electronic transferable records without a corresponding paper-based document", which would eliminate the need to refer to electronic transferable records whose substantive law was medium-neutral, as suggested in paragraph 22 of document A/CN.9/922.

23. After discussion, the Commission agreed to leave the text of the footnote unchanged and to insert the following paragraph after paragraph 11 of document A/CN.9/920: "The list of possible exclusions provided in the footnote to paragraph 3 is purely illustrative. Other subject matter that could be excluded from the scope of application of the Model Law include transport documents and electronic transport records falling under the scope of application of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the 'Rotterdam Rules')".

*Draft explanatory notes to article 1 (*A/CN.9/920, *paras. 1 to 15;* A/CN.9/922, *paras. 22-23)*

24. In addition to the amendments agreed to be made to the draft explanatory notes in connection with footnote 1 to draft article 1 (see para. 23 above), the Commission agreed to redraft paragraph 9 of the draft explanatory notes contained in document A/CN.9/920 as follows: "Paragraph 3 clarifies that the Model Law does not apply to investment securities. The general determination as to which instruments are to be counted as securities is a matter of substantive law. The term 'investment instruments' is understood to include derivative instruments, money market instruments and any other financial product available for investment. The term 'securities' does not refer to the use of electronic transferable records as collateral and therefore the Model Law does not prevent the use of electronic transferable records for security rights purposes".

25. While some support was expressed for the suggestions contained in paragraph 22 of document A/CN.9/922, the prevailing view was that they should not be implemented. It was indicated that adding a reference to medium-neutral substantive law in the draft explanatory notes might add an unnecessary level of complexity, as it was clear that the draft model law could operate only on a functional equivalence basis.

26. It was indicated that contractual parties would be free to use in their agreement any source deemed useful and that, therefore, the insertion in the draft explanatory notes of specific text to indicate that possibility, as suggested in paragraph 23 of document A/CN.9/922, was unnecessary.

Article 2. Definitions

27. No comment was made with respect to the draft article.

*Draft explanatory notes to article 2 (*A/CN.9/920, *paras. 16-21;* A/CN.9/922, *paras. 24-25)*

28. The Commission agreed to replace "the person in control" with "possessor" in the last sentence of paragraph 19 of document A/CN.9/920. The Commission also agreed that the substantive comments contained in paragraphs 24 and 25 of document A/CN.9/922 should be reproduced in a footnote to the term "insurance certificates" in paragraph 20 of document A/CN.9/920.

Article 3. Interpretation

29. No comment was made with respect to the draft article.

*Draft explanatory notes to article 3 (*A/CN.9/920, *paras. 22-27)*

30. No comment was made with respect to the accompanying draft explanatory notes.

Article 4. Party autonomy and privity of contract

31. It was suggested that the draft model law or explanatory notes should explicitly identify provisions from which derogations by parties were permissible. The Commission noted that similar suggestions had been discussed in the Working Group and that the conclusion of that discussion was reflected in paragraph 1 of the draft article, which left it to enacting States to identify provisions from which parties could derogate.

32. The Secretariat informed the Commission that some States, while considering the adoption of the draft model law, had indicated that they would not enact draft article 4. The suggestion was made to monitor legislative enactments, business implementation and judicial application of that article.

*Draft explanatory notes to article 4 (*A/CN.9/920, *paras. 28-34;* A/CN.9/922, *para. 26)*

33. No comment was made with respect to the accompanying draft explanatory notes.

Article 5. Information requirements

34. The consideration of a suggestion to reflect provisions of national law related to the sanctity of private life in the draft article was deferred to a later stage.

35. In the subsequent discussion, no support was expressed for inclusion of the proposed amendment to the draft article, because such an amendment would touch

upon issues of substantive law and would go beyond the intended scope of the draft model law. The Commission decided to retain the draft article unchanged.

Draft explanatory notes to article 5 (A/CN.9/920, paras. 35-37)

36. No comment was made with respect to the accompanying draft explanatory notes.

Article 6. Additional information in electronic transferable records

37. It was suggested that the phrase "as permitted by law" be inserted after the word "information" in the draft article. In response, it was noted that article 1, paragraph 2, of the draft model law precluded the insertion in an electronic transferable record of information not permitted under substantive law. Concern was also expressed that the suggested wording could be interpreted as restricting the addition in electronic transferable records of useful information such as automatically generated technical information.

38. Some delegations were nevertheless of the view that the draft model law or explanatory notes should impose some restrictions on information that could be added in the electronic transferable records so as not to introduce substantive changes with respect to their paper-based equivalents. The Commission decided to retain the draft article unchanged and address the matter in the draft explanatory notes (see para. 39 below).

Draft explanatory notes to article 6 (A/CN.9/920, paras. 38-40)

39. The Commission agreed to explain in paragraph 39 of document A/CN.9/920 that article 1, paragraph 2, of the Model Law would preclude inclusion in an electronic transferable record of additional information not permitted under substantive law.

Article 7. Legal recognition of an electronic transferable record

40. No comment was made with respect to the draft article.

Draft explanatory notes to article 7 (A/CN.9/920, paras. 41-48; A/CN.9/922, para. 27)

41. The Commission agreed with the suggestion contained in paragraph 27 of document A/CN.9/922.

Article 8. Writing

42. No comment was made with respect to the draft article.

Draft explanatory notes to article 8 (A/CN.9/920, paras. 50-56; A/CN.9/922, paras. 42-47)

43. No comment was made with respect to the accompanying draft explanatory notes.

Article 9. Signature

44. No comment was made with respect to the draft article.

Draft explanatory notes to article 9 (A/CN.9/920, paras. 50-54 and 57-61; A/CN.9/922, paras. 28 and 42-47)

45. The Commission agreed to insert in paragraph 57 of document A/CN.9/920 the following clarification: "Reference to electronic signatures in article 9 of the Model Law is intended also as reference to electronic seals or other methods used to enable the signature of a person electronically."

Article 10. Requirements for the use of an electronic transferable record

46. The Commission agreed that the title of the draft article should read "Transferable documents or instruments". It was explained that the suggested title was in line with the naming convention of provisions relating to functional equivalence and was clearer to a reader. No support was expressed for adding the word "exclusive" before the word "control" in paragraph 1 (b) (ii) of the draft article. The Commission agreed to replace the phrase "the electronic transferable record" with the phrase "that electronic record" in paragraph 1 (b) (iii) of the draft article to align the draft of that provision with that of paragraph 1 (b) (ii) of the draft article.

47. Concern was expressed that the translation of the definite article "the" in some languages did not convey the intended meaning. Recognizing that the suggestion raised linguistic rather than substantive issues, the Commission referred the matter to delegates for linguistic consultations together with paragraphs 77 and 78 of the accompanying draft explanatory notes contained in document A/CN.9/920.

48. Further to the linguistic consultations held pursuant to the Commission's request, the Commission considered two options: (a) to include a qualifier "singular" before the words "electronic transferable record" in paragraph 1 (b) (i) of the draft article; or (b) to insert an appropriate qualifier before the phrase "electronic transferable record" in paragraph 1 (b) (i) in those language versions where the definite article could not be used to appropriately convey the notion of singularity of the electronic transferable record. For the latter case, the Commission considered adding explanations along the following lines in paragraphs 77 and 78 of the draft explanatory notes contained in document A/CN.9/920:

> 77. The purpose of the provision is to identify the electronic transferable record that is the equivalent of the transferable document or instrument.
>
> 78. The combination of the article "the" and singular noun in the Arabic, English, French and Spanish language versions of the Model Law suffices to point at the singularity approach. A qualifier is omitted to avoid interpretative challenges. A qualifier could be interpreted as referring to the notion of uniqueness which has been abandoned and could ultimately foster litigation. A qualifier is used in the Chinese and Russian language versions of the Model Law because the proper qualifier may be found in those languages to avoid interpretation problems. All six language versions intend to convey the same notion.

49. Some delegations were of the view that the most desirable solution would be to insert a qualifier in all language versions to avoid any impression that various language versions intended to convey different meaning. It was, however, also recognized by those delegations that the matter had already been extensively

discussed in the Working Group and that reopening that discussion in the Commission would not be desirable.

50. Concern was expressed that the proposed wording did not explain in full the meaning of the notion of "singularity". It was suggested that working group reports and other *travaux préparatoires* could be used to gather additional information on that notion.

51. The Commission decided to implement option (b), with the addition of the word "functional" before the word "equivalent" in the proposed revised paragraph 77 (see para. 48 above). (For further consideration of the matter, see paras. 64 and 66 below.)

*Draft explanatory notes to article 10 (*A/CN.9/920, *paras. 62-86;* A/CN.9/922, *paras. 29, 30 and 38-41)*

52. The proposal was made to change the second sentence of paragraph 63 of document A/CN.9/920 as follows: "Uniqueness of a transferable document or instrument aims to prevent the circulation of multiple documents or instruments relating to the same performance and thus to avoid the existence of multiple claims for performance of the same obligation." The suggestion was accepted.

53. Support was expressed for the proposal to change the third sentence of paragraph 63 of document A/CN.9/920 as follows: "Providing a guarantee of uniqueness in an electronic environment functionally equivalent to an original or authentic document or instrument in the paper world has long been considered a peculiar challenge". The Commission accepted that proposal.

54. The Commission agreed to change the first sentence of paragraph 64 of document A/CN.9/920 as follows: "Uniqueness is a relative notion that poses technical challenges in an electronic environment, as providing an absolute guarantee of non-replicability may not be technically feasible and as the identification of the specific record that is supposed to constitute the equivalent to a corresponding transferable document or instrument is not obvious due to the lack of a tangible medium."

55. The Commission agreed to change the third sentence of paragraph 64 of document A/CN.9/920 as follows: "However, a paper document, as a physical object, is by nature unique and, furthermore, centuries of use of paper in business transactions have provided sufficient information to commercial operators for an assessment of the risks associated with the use of that medium, while practices relating to the use of electronic transferable records are not yet equally well established."

56. The Commission agreed to change paragraph 65 of document A/CN.9/920 as follows: "Article 10 aims at preventing the possibility of the existence of multiple claims to perform the same obligation by combining two approaches, i.e. 'singularity' and 'control'."

57. A suggestion was made to delete the words "and 'control'" in paragraph 67 of document A/CN.9/920. There was disagreement with the suggested change and the Commission decided to retain the wording unchanged.

58. The Commission agreed to add the word "also" before the phrase "have an evidentiary value" in the last sentence of paragraph 68 of document A/CN.9/920.

59. After discussion, the Commission agreed to replace the first and the second sentences of paragraph 70 of document A/CN.9/920 as follows: "The definition of 'electronic transferable record' does not cover certain documents or instruments which are generally transferable but whose transferability may be limited due to other agreements, for example in the case of straight bills of lading."

60. The suggestion was made to redraft the second sentence in paragraph 76 of document A/CN.9/920 as follows: "That requirement implements the requirement of a singular claim." The alternative view was that the wording should be retained unchanged since the provisions in question aimed at achieving the singularity of the record, not a singularity of claim. The Commission decided to retain the text unchanged.

61. The Commission agreed to delete the words "as opposed to other electronic records that are not transferable" in the first sentence of paragraph 77 of document A/CN.9/920. Clarification was sought about the second sentence in paragraph 77.

62. The suggestion was made to state clearly, for example in an introductory part to the explanatory notes, that an electronic transferable record confers the same rights and imposes the same obligations as a corresponding transferable document or instrument.

63. The Commission heard the suggestion that paragraph 78 of document A/CN.9/920 should be deleted or amended to explain the difference between "singularity" and "uniqueness". The alternative suggestion was to delete the introductory words "unlike other legislation on electronic transferable records,".

64. The Commission deferred decisions on paragraphs 77 and 78 of document A/CN.9/920 to a later stage until the linguistic issues referred to in paragraph 47 above were resolved. (For further consideration of the matter, see para. 66 below.)

65. The suggestion was made to delete paragraph 80 of document A/CN.9/920 or add to it a reference to article 12. The Commission agreed to retain the paragraph with a reference to article 12 along the lines of the reference contained in the last part of paragraph 81 of document A/CN.9/920.

66. The Commission agreed to revise paragraphs 77 and 78 of the draft explanatory notes to reflect the understanding reached on provisions of draft article 10, paragraph (1) (b) (i) (see para. 51 above).

67. With respect to the relationship between paragraphs 81 and 119 of the draft explanatory notes as to whether the reliability standard should be characterized as subjective or objective, the suggestion was made to remove the words "or subjective" from paragraph 81. It was explained that the same general reliability standard applied to the various articles of the model law and was therefore objective, while the assessment of the reliability of each method was to be carried out in the light of the specific function pursued with that method and was therefore relative. The Secretariat was requested to reflect those points in explanatory notes.

68. The Commission agreed to remove the words "or subjective" from paragraph 81 of the draft explanatory notes.

69. The Commission agreed to revise paragraphs 82 and 83 of the draft explanatory notes as follows:

> 82. Unlike other UNCITRAL texts on electronic commerce, the Model Law does not use the term "original" in the provisions that contain the requirements for establishing functional equivalence to the paper-based notion of "original". In that respect, it should be noted that article 8 of the UNCITRAL Model Law on Electronic Commerce refers to a static notion of "original", while electronic transferable records are meant, by their very nature, to circulate. Therefore, the notion of "original" in the context of electronic transferable records is different from that adopted in other UNCITRAL texts. With regard to the dynamic notion of "original" in the context of electronic transferable records, article 10, paragraph 1 (b) (iii), of the Model Law refers to integrity of the electronic transferable record as one of the requirements that needs to be fulfilled in order to achieve functional equivalence with a transferable document or instrument.
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> 83. Hence, while the notion of "original" of transferable documents or instruments is particularly relevant to prevent multiplicity of claims, the Model Law achieves that goal with the use of the notions of "singularity" and "control" that allow identifying both a specific electronic record as the electronic transferable record to entitle the person in control to claim performance and that is the object of control (see above, paras. 65-67).

70. Clarification was sought regarding the words "dynamic notion of 'original'". The attention of the Commission was drawn to the explanation already contained in paragraph 82 of the draft explanatory notes, which could be expanded as necessary. The additional explanation could convey in particular that article 8 of the UNCITRAL Model Law on Electronic Commerce,[8] establishing functional equivalence for the notion of "original", referred to concepts such as "first generated in its final form", and was therefore particularly suitable for documents such as contracts whose modification was possible but neither necessary nor frequent. The notion of "original" in the draft model law, on the other hand, took into account the fact that, after issuance, the electronic transferable record was necessarily subject to modifications and would not be in its "final form" until presentation. The Commission agreed to insert that clarification in paragraph 82 of the draft explanatory notes.

71. The Commission agreed to implement the suggestion contained in paragraph 30 of document A/CN.9/922.

Article 11. Control

72. It was suggested that the title of the draft article should be changed from "Control" to "Possession" to convey the intended purpose of that draft article and to ensure consistency with the naming style of other articles relating to functional equivalence contained in the draft model law. In reply, it was noted that the Working Group had decided to highlight the notion of "control" in the title of article 11 because of its novelty and relevance. Recalling that discussion of the Working Group, the Commission agreed to retain the title unchanged.

73. It was also suggested that the word "publicly" should be added before the word "identify" in paragraph 1 (b) to stress the need to identify the person in control vis-à-

[8] General Assembly resolution 51/162, annex.

vis concerned parties. Concern was raised that the suggestion might have substantive law implications, in particular as regards the role of public registries. Concern was also expressed that the proposal had never been discussed by the Working Group. The point was made that the suggestion would need to be reconciled with the need to accommodate anonymity and the use of pseudonyms under the draft model law. Support was expressed for retaining the text unchanged with inclusion of additional explanation in the explanatory notes, if necessary, of the issue intended to be addressed with the suggestion. The Commission agreed to retain the text unchanged.

74. It was also suggested that the word "exclusive" should be inserted before the word "control" in paragraph 2 of the draft article to ensure consistency between that paragraph and paragraph 1 (a) of the same article that contained that qualifier. The Commission agreed to retain the text unchanged and to add at the end of paragraph 100 of the draft explanatory notes the following sentences: "Transfer of control implies transfer of exclusive control since the notion of 'control', similarly to that of 'possession', implies exclusivity in its exercise. The considerations on the joint exercise of control apply also to transfer of control (see above, paras. 92 and 95)."

75. Another suggestion was to insert the words "or permits" before the words "the possession" in the chapeau of paragraph 1 of the draft article, to reflect that security rights could be made effective against third parties by various methods, such as by taking possession or control or registering notice of the security right. It was noted that the same wording "or permits" was used in paragraph 2 of the draft article. Recognizing the need to ensure consistency of the draft model law with UNCITRAL texts in the area of security interests, the Commission agreed to change the chapeau of paragraph 1 of draft article 11 as suggested. The Commission also agreed to add to the draft explanatory notes the following explanations that would accompany the revision made: "This Model Law is not intended to restrict the creation of security rights in transferable documents or instruments. Thus, the control envisaged under article 11 provides the functional equivalent in those cases where the security rights would be created and made effective against third parties by possession of a paper document or instrument. This Model Law is also not intended to limit the creation of security rights where those rights would be made effective against third parties by their registration in a public registry." The Secretariat was requested to ensure that the text was consistent with the UNCITRAL texts in the area of security interests as regards terminology.

Draft explanatory notes to article 11 (A/CN.9/920, paras. 87-102)

76. In addition to the changes in the draft explanatory notes agreed in conjunction with the proposed amendments to draft article 11 (see paras. 74 and 75 above), the Commission also agreed:

(a) To revise paragraph 94 of the draft explanatory notes as follows: "Paragraph 1 (b) requires the person in control of the electronic transferable record to be reliably identified as such. The person in control of an electronic transferable record is in the same legal position as the possessor of an equivalent transferable document or instrument.";

(b) To replace the second sentence of paragraph 96 of the draft explanatory notes with the following wording: "The use of the services of a third party to exercise exclusive control does not affect exclusivity of control. It neither implies nor excludes

the possibility that such a third party service provider or any other intermediary is a person in control. The person in control is to be determined by the applicable substantive law.";

(c) To replace the third sentence of paragraph 102 with the following: "The Model Law does not contain specific provisions on surrender, since paragraph 2, which governs transfer of control as the functional equivalent of transfer of possession and thus of delivery, would apply also to those cases.".

Article 12. General reliability standard

77. Several delegations were of the view that some of the circumstances listed in the draft article should be mandatory. It was explained that, in particular, the assurance of data integrity, the ability to prevent unauthorized access to and use of the system and the security of hardware and software were elements of critical importance for the correct management of electronic transferable records, in particular across borders. It was added that, for the same reasons, derogations by contracting parties from the standards to determine the reliability of those elements should not be allowed.

78. Another suggestion was to insert additional items under paragraph (a) of the draft article that would address reliability of the method in addition to the reliability of the computer system. Specific indicators suggested for inclusion in paragraph (a) included extensive use of the standard, maturity of the technology used and reasonable design of the technology. The suggestion was made that, if those provisions were not included in the draft article, they should at least be reflected in the explanatory notes.

79. Views were expressed that those same issues had already been extensively discussed in the Working Group and the result of those deliberations was reflected in the current draft of article 12. Reopening the discussion of those issues in the Commission would therefore be undesirable.

80. The Commission decided to retain the draft article unchanged and reflect relevant points in the explanatory notes. (For further consideration of the matter, see paras. 82 to 84 below.)

*Draft explanatory notes to article 12 (*A/CN.9/920, *paras. 103-120;* A/CN.9/922, *paras. 29, 31, 32 and 48)*

81. With respect to paragraph 32 of document A/CN.9/922, the Commission agreed to clarify in paragraph 116 of the draft explanatory notes that reference to industry standards should not be interpreted as favouring the industry standards of one sector over those of others, which could be detrimental to supply chain management.

82. The view was expressed that paragraphs 104, 119 and other parts of the draft explanatory notes should highlight such elements as data integrity, access protection and hardware and software security as mandatory or more important for the reliability of electronic transferable records, in particular in the cross-border context. A related view was that the explanatory notes could encourage the parties to comply with those elements.

83. The alternative view was that no particular element from the illustrative list contained in draft article 12, subparagraph (a), should be highlighted in the

explanatory notes as mandatory or more important, as the relevance of each element was circumstantial. The Commission recalled its decisions as regards draft article 4, on party autonomy and privity of contract (see para. 31 above), which left it to enacting States to identify provisions from which derogations by parties would not be permissible. It was understood that those provisions of article 4 would also be applicable to the list in draft article 12, subparagraph (a).

84. Some support was expressed for deleting paragraph 119 of the draft explanatory notes. The alternative view was that the paragraph should be retained. The Commission decided to retain the text of paragraph 119 unchanged.

Article 13. Indication of time and place in electronic transferable records

85. The Commission agreed to revise the draft article as follows: "Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record."

Draft explanatory notes to article 13 (A/CN.9/920, *paras. 121-126)*

86. No comment was made with respect to the accompanying draft explanatory notes.

Article 14. Determination of place of business

87. The suggestion was made to change the title of the draft article to "Place of business" to better reflect its content. The Commission agreed with that suggestion.

88. Doubts were expressed about the scope of the draft article, in particular in the absence of any reference to the place of business in other provisions of the draft model law. The view was expressed that the determination of the place of business would be relevant with respect to issuance of the electronic transferable record and performance of the obligation contained therein, and that in both of those cases applicable substantive law would determine the place of business. Support was expressed for deleting draft article 14 because it might interfere with substantive law. The alternative view was that the draft article was the result of careful consideration by the Working Group and should be retained unchanged.

89. The Commission agreed to retain the draft article unchanged on the understanding that it might be helpful to States whose substantive law was silent on the determination of the place of business relevant to electronic transferable records.

Draft explanatory notes to article 14 (A/CN.9/920, *paras. 127-130)*

90. No comment was expressed with respect to the accompanying draft explanatory notes.

Article 15. Issuance of multiple originals

91. The suggestion was made to delete the draft article. The point was made that the practice of requiring multiple originals had originated in the paper environment in the light of concerns about loss of the only existing original. Doubts were expressed about the intent and the meaning of issuance of multiple originals in the electronic environment where such risks did not arise. It was noted that the Working Group had

considered the draft article on the understanding that a business need for the issuance of multiple originals might arise, whereas subsequent consultations on the draft model law had not indicated such a need.

92. Another view was that the draft article should be retained unchanged. It was recalled that the draft model law did not purport to establish substantive rules on the matter (e.g., to permit or prohibit issuance of multiple originals). It was added that, where the substantive law allowed issuance of multiple originals, the draft article could be useful in establishing functional equivalence rules.

93. Broad support was expressed for the view that the deletion or retention of the draft article did not change the fact that issuance of multiple originals was possible under draft article 10 of the model law. The question arose as to whether the draft model law and explanatory notes should nevertheless encourage or discourage such a practice. It was agreed that the draft model law and explanatory notes should remain neutral on the matter.

94. The Commission agreed to delete the draft article but to retain most of the comments on issuance of multiple originals in explanatory notes.

*Draft explanatory notes to article 15 (*A/CN.9/920, *paras. 131-136;* A/CN.9/922, *paras. 33-35)*

95. Following the deletion of draft article 15 (see para. 94 above), the Commission agreed to amend paragraphs 131 to 136 of the draft explanatory notes contained in document A/CN.9/920 to read as follows:

> 131. The possibility of issuing multiple originals of a transferable document or instrument exists in several fields of trade. The Model Law does not affect the continuation of that practice with respect to the use of electronic transferable records in accordance with article 10 of the Model Law when that practice is permitted under applicable law. Similarly, the Model Law does not prevent the possibility of issuing multiple originals on different media (e.g., one on paper and one in electronic form), where this is permitted under applicable law.
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> 132. As noted (see above, para. 82), the Model Law does not contain a functional equivalent of the paper-based notion of original. Instead, the functions fulfilled by the original of a transferable document or instrument with respect to requesting performance are satisfied in an electronic environment by the notions of "singularity" and "control" (see above, paras. 65-67). Hence, the transposition of the practice of issuing multiple original transferable documents or instruments in an electronic environment requires the issuance of multiple electronic transferable records relating to the performance of the same obligation.
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> 133. However, caution should be exercised when issuing multiple electronic transferable records. In fact, doing so might lead to multiple claims for the same performance based on the presentation of each original. Moreover, in an electronic environment, the same functions may be pursued as with the issuance of multiple original transferable documents or instruments by selectively attributing control over one electronic transferable record to multiple entities on the basis of the legal rights attributed to each entity (for example, title to property of goods, or security interests). In practice, an electronic transferable

records management system could, for instance, provide information on multiple claims having different objects relating to the same electronic transferable record.

134. If substantive law contains an obligation to indicate whether multiple originals have been issued, the electronic transferable record must comply with it in accordance with the information requirements contained in article 10, paragraph 1 (a), of the Model Law.

135. Similarly, the Model Law does not specify whether one or all originals must be presented to request the performance of the obligation contained in the electronic transferable record as this matter is determined by applicable law or, where possible, by contractual agreement.

Article 16. Endorsement

96. No comment was made with respect to the draft article.

Draft explanatory notes to article 16 (A/CN.9/920, paras. 137-141)

97. No comment was made with respect to the accompanying draft explanatory notes.

Article 17. Amendment

98. No comment was made with respect to the draft article.

Draft explanatory notes to article 17 (A/CN.9/920, paras. 142-147)

99. No comment was made with respect to the accompanying draft explanatory notes.

Article 18. Replacement of a transferable document or instrument with an electronic transferable record

100. No comment was made with respect to the draft article.

Draft explanatory notes to article 18 (A/CN.9/920, paras. 148-162)

101. The Commission agreed to insert after paragraph 157 of the draft explanatory notes the following sentences: "However, information contained in a transferable document or instrument may have legal value for purposes not related to the functions pursued with transferability. For instance, a bill of lading may provide evidence of a contract of carriage of goods. The legal status of that information is to be determined by substantive law. Moreover, article 18 does not apply in cases where a second original is deliberately issued on a medium different from that used for the first original."

Article 19. Replacement of an electronic transferable record with a transferable document or instrument

102. No comment was made with respect to the draft article.

Draft explanatory notes to article 19 (A/CN.9/920, paras. 163-170)

103. No comment was made with respect to the accompanying draft explanatory notes.

104. It was agreed to add before paragraph 167 of the draft explanatory notes the following guidance on storage and archiving: "The Model Law does not contain specific provisions on storage and archiving. All applicable retention requirements found in other law, including the law on privacy and data retention, should be complied with. The notions of storage and archiving may apply to the information contained in the electronic transferable record, but not to the electronic transferable record as such." (A/CN.9/834, paras. 74 and 75.)

Article 20. Non-discrimination of foreign electronic transferable records

105. The suggestion was made that the draft article should be supplemented with the following provision: "The principle of non-discrimination of electronic transferable records may not in itself constitute grounds for recognizing the legal effect, validity or enforceability of foreign electronic transferable records if such records do not meet the criteria determining the reliability of the method used, as set out in article 12." It was indicated that if that suggestion was not accepted by the Commission, the proposed text could be included in the explanatory notes as an alternative.

106. The Commission decided to retain the draft article unchanged. (For the consideration of the suggestion in the context of the draft explanatory notes to article 20, see para. 108 below.)

Draft explanatory notes to article 20 (A/CN.9/920, paras. 171-179)

107. The suggestion was made to add to the explanatory notes the following provision: "The underlying domestic criteria concerning acceptance or non-acceptance of electronic transferable records issued or used in a jurisdiction not allowing the issuance and use of such records should not only be made public (transparency) but also be non-discriminatory. Therefore, the relevant implementing measures in such cases should be objective in nature and also not, in themselves, based 'solely' on origin. This assumes that acceptance of such records from jurisdictions that do allow their issuance or use would normally not raise these issues." It was noted that the suggested addition had substantive law implications and would broaden the intended scope of draft article 20. For those reasons, the Commission decided not to include the suggested wording in the explanatory notes to article 20.

108. As regards the suggestion to reflect in explanatory notes to article 20 the proposed wording in paragraph 105 above, concern was expressed about including it in its entirety since that text might conflict with paragraph 2 of draft article 20 by dictating a universal answer on how to deal with issues arising from the cross-border use of electronic transferable records. It was explained that paragraph 2 of draft article 20 left those issues for resolution by States on a case-by-case basis. The Commission agreed to include in paragraph 176 of the draft explanatory notes the following wording: "The principle of non-discrimination of electronic transferable records may not in itself constitute a ground for recognizing the legal effect, validity or enforceability of foreign electronic transferable records."

Draft explanatory notes: Introduction (A/CN.9/922, paras. 4-21)

109. It was suggested that the second sentence of paragraph 8 of the draft introduction contained in document A/CN.9/922 could be revised as follows: "Article 14, paragraph 3, of the Hamburg Rules may be interpreted as implying the possible use of electronic bills of lading." The Commission agreed with the suggestion.

110. The Commission recalled its decision to refer, in paragraph 13 and elsewhere in the explanatory notes where reference was made to medium-neutral electronic transferable records, to electronic transferable records for which substantive law was medium-neutral. In line with that decision, the Commission agreed to revise the fourth sentence of paragraph 13 of the proposed introduction to the explanatory notes contained in document A/CN.9/922 as follows: "The Model Law does not apply to electronic transferable records existing only in electronic form, as those records do not need a functional equivalent to operate in the electronic environment. The Model Law does not affect the medium-neutral substantive law applicable to electronic transferable records".

111. Subject to the above changes, the Commission approved the insertion of the introduction contained in chapter II, section A ("Proposed introduction"), of document A/CN.9/922, in the explanatory notes.

Relationship of the draft model law with other UNCITRAL texts in the area of electronic commerce (A/CN.9/922, paras. 36-53)

112. No support was expressed for adding a passage on the issues raised in paragraphs 42-48 of document A/CN.9/922 to the explanatory notes. The view was expressed that consideration of those issues should be deferred to a working group or should be addressed by enacting States on a case-by-case basis. In the subsequent discussion, no support was expressed for taking up those issues at the working group level.

113. It was recalled that the draft model law had been drafted with a focus on electronic transferable records and that no interaction with other UNCITRAL texts in the area of electronic commerce had thoroughly been considered by the Working Group. It was explained that different legislative solutions could be justified in the light of the specific focus of each text. It was also noted that practices of States in enacting UNCITRAL model laws varied, and it could therefore be undesirable to provide a universally applicable solution.

114. The Commission left it to the Secretariat, as part of its technical assistance activities, to provide guidance to States on how the UNCITRAL model law on electronic transferable records could interact with other texts of UNCITRAL in the area of electronic commerce on a case-by-case basis.

3. Adoption of the UNCITRAL Model Law on Electronic Transferable Records with an Explanatory Note

115. The Commission, after consideration of the text of the draft model law, adopted the following decision at its 1057th meeting, on 13 July 2017:

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Mindful that, while the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005),[9] the UNCITRAL Model Law on Electronic Signatures (2001)[10] and the UNCITRAL Model Law on Electronic Commerce (1996)[11] are of significant assistance to States in enabling and facilitating electronic commerce in international trade, they do not deal or do not sufficiently deal with issues arising from the use of electronic transferable records in international trade,

Considering that uncertainties as to the legal value of electronic transferable records constitute an obstacle to international trade,

Convinced that legal certainty and commercial predictability in electronic commerce will be enhanced by the harmonization of certain rules on the legal recognition of electronic transferable records on a technologically neutral basis and according to the functional equivalence approach,

Recalling that, at its forty-fourth session, in 2011, it mandated Working Group IV (Electronic Commerce) to undertake work on electronic transferable records,[12]

Having considered at its fiftieth session, in 2017, a draft model law on electronic transferable records prepared by the Working Group,[13] together with comments on the draft received from Governments and international organizations invited to sessions of the Working Group,[14]

Noting that the draft model law prepared by the Working Group deals with the use of electronic transferable records equivalent to paper-based transferable documents or instruments and does not deal with the use of transferable records existing only in electronic form or transferable records, documents or instruments for which substantive law is medium-neutral,

Believing that an UNCITRAL model law on electronic transferable records will constitute a useful addition to existing UNCITRAL texts in the area of

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[9] General Assembly resolution 60/21, annex.

[10] General Assembly resolution 56/80, annex.

[11] General Assembly resolution 51/162, annex.

[12] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[13] A/CN.9/920.

[14] A/CN.9/921 and addenda.

electronic commerce by significantly assisting States in enhancing their legislation governing the use of electronic transferable records, or in formulating such legislation where none currently exists,

1. *Adopts* the UNCITRAL Model Law on Electronic Transferable Records, annexed to the report of the fiftieth session of the Commission;

2. *Requests* the Secretariat to finalize an explanatory note that will accompany the UNCITRAL Model Law on Electronic Transferable Records by reflecting deliberations and decisions at the Commission's fiftieth session as regards the draft explanatory notes contained in documents A/CN.9/920 and A/CN.9/922;

3. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Electronic Transferable Records together with an explanatory note, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

4. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Electronic Transferable Records when revising or adopting legislation relevant to electronic transferable records, and invites States that have used the Model Law to advise the Commission accordingly.

B. Progress report of Working Group IV

116. The Commission recalled that, at its forty-ninth session, in 2016, it had mandated Working Group IV (Electronic Commerce) to take up work on the topics of identity management and trust services as well as of cloud computing upon completion of the work on the draft model law on electronic transferable records. In that context, the Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics, including with respect to their feasibility, in parallel and in a flexible manner and to report back to the Commission so that it could make an informed decision at a future session, including on the priority to be given to each topic.[15]

117. At its current session, the Commission had before it reports of the Working Group on its fifty-fourth session (A/CN.9/897), held in Vienna from 31 October to 4 November 2016, and on its fifty-fifth session (A/CN.9/902), held in New York from 24 to 28 April 2017. The Commission was informed that, at the fifty-fifth session of the Working Group, there was general agreement on the view that the suggested work on identity management and trust services on the one hand, and on cloud computing on the other, were different in scope and content. At the same session of the Working Group, it had been suggested that work on the two topics could continue in parallel, taking into account that differences between the projects on those two topics could lead to their having different rates of development. However, at the session, the view had also been reiterated that parallel work on both topics could place excessive demands on the Working Group, in particular at a more advanced stage, to the detriment of the quality of the final products (A/CN.9/902, para. 94). The Commission

[15] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 235.

was also informed that, at the session of the Working Group, various views had been expressed on recommendations for future work (A/CN.9/902, paras. 95 and 96).

118. At the current session, the Commission heard different preferences for continuing work on each topic.

119. As regards work in the area of cloud computing, the view was expressed that the preparation of a checklist of contractual issues relating to cloud computing, identified by the Working Group as its project in that area, could proceed and be finalized expeditiously on the basis of research already accomplished, given that the content and the structure of the envisaged checklist had already been defined by the Working Group. It was noted that that work would be of great relevance for commercial operators. The view was expressed that, after completion of that work, the Working Group might consider taking up further projects in that area under the mandate given to it by the Commission during the previous year. The desirability of elaborating substantive rules on cloud computing by UNCITRAL was noted.

120. The prevailing view, however, was that it would be premature to discuss further work in that area beyond the preparation of the checklist. Some delegations were of the view that no further work in that area by UNCITRAL would be necessary. It was further indicated that, in any work in that area, cooperation would need to be sought with other organizations active in the field, namely the Hague Conference on Private International Law, with respect to the private international law aspects of cloud computing.

121. While recognizing that cloud computing raised important legal issues, many delegations were of the view that priority should be given to the work of UNCITRAL on legal aspects of identity management and trust services. Several delegations stressed that identity management and trust services were foundational to all UNCITRAL texts on electronic commerce and, more generally, to the use of electronic communications. It was indicated that strong commercial interest existed with regard to those topics. Ensuring cross-border reliability and interoperability and recognition of identity management and trust services for trustworthiness of commercial transactions and cross-border trade were thus considered important and urgent. The view was expressed that work on both identity management and trust services should proceed together in the light of a close interaction between those two topics. Drawing on existing regional instruments in that area, such as the European Union regulation on electronic identification and trust services for electronic transactions in the internal market,[16] was considered important.

122. It was recognized that work in the area of identity management and trust services was newer and more ambitious, touched upon more sensitive issues, generated greater interest and required, at the current stage, more brainstorming and concretization than work in the area of cloud computing. Support was expressed for the drafting of a legislative text on identity management and trust services. The suggestion was also made to continue discussing scope, key definitions and key principles related to identity management and trust services, since those issues would be relevant to any instrument prepared in that area.

[16] Regulation No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

123. The alternative view was that it would be unfeasible and undesirable for the Working Group to start drafting any text on identity management and trust services before the scope and goals of the work in that area had been clarified. Attention was drawn in particular to the need to clarify the relevance of trust services for identity management. Preference was therefore expressed for continuing to brainstorm, in the Working Group, general issues related to identity management and trust services. It was suggested that, once the progress report of the Working Group to the Commission at its next session had been considered, the Commission would be in a better position to give a more concrete mandate to the Working Group as regards its work in that area.

124. Some delegations did not object to the work in the area of cloud computing proceeding in parallel with the work in the area of identity management and trust services, although doubt was expressed about the utility of the envisaged checklist. Other delegations favoured prioritizing work in the area of identity management and trust services if the issue of resource constraints in handling work in both areas in parallel would arise. Other delegations expressed the view that they would wish to prioritize work in the area of cloud computing if resource constraints were indeed an issue.

125. A suggestion was made to delegate the work in the area of cloud computing to the Secretariat or an expert group so as not to use the Working Group's resources for detailed deliberations on the checklist. The understanding was that, if such an approach were followed, the Working Group would periodically review the progress of the Secretariat with regard to the preparation of the checklist.

126. While some support was expressed for that suggestion, there was also strong support for having the Working Group proceed with the work in that area. The view was expressed that work on cloud computing would require extensive technical deliberations in the Working Group, in addition to research by the Secretariat, since cloud computing touched on complex issues of cross-border legal relations and various branches of law.

127. Recognizing that, until the next session of the Commission in 2018, both the Secretariat and the Working Group would be able to handle both projects in parallel, the Commission reaffirmed the mandate given to the Working Group at its forty-ninth session, in 2016 (see para. 116 above). It agreed to revisit that mandate at its next session, in particular if the need arose to prioritize between the topics or to give a more specific mandate to the Working Group as regards its work in the area of identity management and trust services. The Secretariat was requested to consider convening expert group meetings as it deemed necessary to expedite the work in both areas and ensure the productive use of conference resources by the Working Group. States and international organizations were invited to share with the Working Group and the Secretariat their expertise in the areas of work assigned to the Working Group.

128. The Commission was informed about ongoing work in the field of paperless trade, including the legal aspects of electronic single-window facilities. It was indicated that that work was aimed in particular at exploring the complementarity between the chapters of free trade agreements on electronic commerce and UNCITRAL texts on electronic commerce, with a view to supporting the implementation of those chapters through the adoption of UNCITRAL texts.

IV. Consideration of issues in the area of security interests

A. Finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions

129. The Commission recalled that, at its forty-ninth session, in 2016, it had adopted the UNCITRAL Model Law on Secured Transactions,[17] and had given Working Group VI (Security Interests) two sessions to complete its work on a draft guide to enactment of that Model Law.[18] The Commission noted with appreciation that, at its thirtieth and thirty-first sessions, the Working Group had done so. At its current session, the Commission had before it the reports of those sessions of the Working Group (A/CN.9/899 and A/CN.9/904) and the draft guide to enactment (A/CN.9/914 and Adds.1-6).

130. The Commission agreed that the Secretariat should be given a mandate to make the changes to the draft guide to enactment that were approved by the Commission at its current session and necessary consequential editorial changes, avoiding making changes where it was not clear whether they would be editorial or substantive. The Commission also agreed that the Secretariat should review the entire draft guide to enactment to ensure consistency in the terminology used.

131. After considering a recommendation made by the Working Group at its thirty-first session, the Commission decided that a corrigendum should be issued to the Model Law: (a) to refer in article 81, paragraph 5, to paragraphs 3 and 4, and not to paragraphs 1 and 2 (see A/CN.9/904, para. 35); and (b) to add in article 85, paragraph 1, a reference to article 98 (see A/CN.9/904, para. 41).

1. Preface and general part (A/CN.9/914, paras. 1-20)

132. With respect to paragraph 4, it was agreed that: (a) the purpose of the Model Law should be stated more clearly by reference to wording that was used in the decision of the Commission adopting the Model Law and the relevant General Assembly resolution;[19] and (b) it should clarify that the Model Law had been designed for implementation in States with different legal traditions.

133. In the discussion, a suggestion was made that an additional paragraph should be inserted after paragraph 7 to explain the need to adapt the Model Law in States that already had efficient and modern systems of secured transactions that partially departed from the Model Law. It was stated that, for example, a system based on an ex-ante control of the documents by highly specialized civil servants might lead to the reduction of litigation, avoid delays in States with slow and inefficient judicial systems and facilitate control of money-laundering and abusive contractual clauses between large lenders and small and medium-sized enterprises. That suggestion did not receive sufficient support. It was stated that the Model Law was already sufficiently flexible and that such a paragraph could be interpreted as an open invitation to States to consider adopting the Model Law partly rather than as a whole.

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[17] United Nations publication, Sales No. E.17.V.1.

[18] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 119 and 122.

[19] General Assembly resolution 71/136.

134. Subject to the above-mentioned changes, the Commission adopted the preface to and the general part of the draft guide to enactment (A/CN.9/914, paras. 1-20).

2. **Chapter I. Scope of application and general provisions** (A/CN.9/914, paras. 21-76)

135. With respect to paragraph 28, it was agreed that recommendation 6 in the *UNCITRAL Legislative Guide on Secured Transactions*[20] (the "Secured Transactions Guide") was different from article 1, paragraph 4, and thus the reference to that recommendation should be deleted or explained.

136. With respect to paragraph 29, it was agreed that the last sentence should be deleted, as the Model Law did not contain any consumer protection rules.

137. The Commission considered the question of whether paragraph 31 should be revised and complemented by a set of model rules on security rights in attachments to movable and immovable property.

138. After discussion, the Commission agreed that paragraph 31 should be revised (but not complemented by a set of model provisions) to: (a) draw the attention of legislators to issues relating to attachments in movable and immovable property, referring to the relevant recommendations of the Secured Transactions Guide (see recommendations 21, 41, 43, 87, 88, 164-166 and 184); (b) explain that the Model Law did not address issues relating to security rights in attachments mainly because the general rules applied to security rights in attachments to movable property, and attachments to immovable property involved issues that did not lend themselves to harmonization at the international level; (c) note that, for that reason, the Secured Transactions Guide essentially deferred to national immovable property law; (d) explain that an attachment to movable property meant a tangible asset that was physically attached to another tangible asset in a manner that did not cause it to lose its separate identity; (e) clarify that a security right might be created in a tangible asset that was an attachment to movable property at the time of creation of the security right or became an attachment subsequently (see recommendation 21); (f) mention that a security right in a tangible asset that was effective against third parties at the time when the asset became an attachment to movable property remained effective against third parties thereafter without any further action (see recommendation 42); (g) note that the rule of "first to register or otherwise make effective against third parties a security right" applied to the various priority competitions discussed in the Secured Transactions Guide, including to a priority competition between a security right in a tangible asset that had become an attachment to movable property and a security right in that movable property (see Secured Transactions Guide, chap. V, para. 115); and (h) recommend that States enact a rule providing that the enforcing secured creditor would be liable for any damage to a movable asset caused by the act of removal of an attachment to movable property other than any diminution in its value attributable solely to the absence of the attachment (see recommendation 166).

139. With respect to paragraph 40, it was agreed that the last sentence should be deleted, as the question whether a control agreement needed to be in a single document or not was a matter for contract law or the law of evidence.

[20] United Nations publication, Sales No. E.09.V.12.

140. With respect to paragraph 43, it was agreed that examples should be given of assets that, depending on their use, could be characterized as consumer goods, inventory or equipment.

141. With respect to paragraph 4 , it was agreed that the second sentence should be placed elsewhere in the dra t guide to enactment (possibly in document A/CN.9/914/Add.1, para. 3), as it did not necessarily relate to the definition of the term "grantor".

142. With respect to paragraph 53, it was agreed that the example at the end of the last sentence should be deleted, as in that example the issuer did not have possession of the document.

143. With respect to paragraph 71, it was agreed that the third and fourth sentences should be more closely aligned with the text approved by the Commission at its last session.[21]

144. With respect to paragraph 74, it was agreed that the words "is inspired by" and "based on" in the first sentence should be replaced with more generic wording along the following lines: "follows the approach taken in".

145. Subject to the above-mentioned changes, the Commission adopted chapter I (Scope of application and general provisions) (A/CN.9/914, paras. 21-76).

3. Chapter II. Creation of a security right (A/CN.9/914/Add.1, paras. 1-36)

146. It was agreed that paragraph 1 should be revised to encourage States to enact the Model Law as a whole, including the asset-specific rules (in particular those on core commercial assets such as receivables), omitting only rules relating to types of assets that were unlikely to be used as security for credit in those States.

147. With respect to paragraph 3, it was agreed that it should clarify that: (a) in a general lease, a lessee could only create a security right in its rights under the lease; and (b) in a financial lease, as a result of the priority rules, a lessee could create a security right in the leased asset as a whole and that security right could have priority over the financial lease right of the lessor with respect to which no security right was registered. It was also agreed that the discussion as to whether the creditor of a receivable had the right to create a security right in a receivable even if it had transferred the receivable was a different matter and should be discussed in a separate paragraph.

148. With respect to paragraph 8, it was agreed that the last two sentences should be deleted because the maximum amount for which the security right might be enforced was often set at an extremely high level and thus did not protect grantors from excessive economic commitments.

149. With respect to paragraph 9, it was agreed that it should also reflect the last sentence of recommendation 17 contained in the Secured Transactions Guide ("Any exceptions to these rules should be limited and described in the law in a clear and specific way.").

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[21] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 98.

150. With respect to paragraph 10, it was agreed that it should include a reference to paragraph 30 of document of A/CN.9/914, which explained that article 1, paragraph 6, implemented recommendation 18 contained in the Secured Transactions Guide.

151. With respect to paragraph 14, it was agreed that it should explain: (a) that to avoid giving the secured creditor a windfall, the secured creditor's right to enforce its security right both in the original encumbered asset and in the proceeds was limited by the amount of the secured obligation outstanding at the time of enforcement (see the Secured Transactions Guide, chap. II, para. 85); and (b) the impact of the absence of a rule along the lines of article 10, paragraph 1, which was discussed in the last sentence.

152. With respect to paragraph 15, it was agreed that the reference to a negotiable warehouse receipt that covered new inventory as proceeds of original encumbered inventory should be deleted, as such a warehouse receipt would not constitute proceeds. It was also agreed that the last sentence should be revised to stipulate that if encumbered assets were described in the security agreement in a comprehensive way (for example, inventory and receivables), those assets would be original encumbered assets, but they could also be proceeds if necessary (as, for example, in the grantor's insolvency, where a security right would not extend to assets acquired after the commencement of insolvency with respect to the grantor, unless they were proceeds of encumbered assets that belonged to the grantor before the commencement of insolvency; see the Secured Transactions Guide, recommendation 235).

153. It was agreed that paragraphs 16 and 17 should also refer to money, as article 10, paragraph 2, applied not only to rights to payment of funds credited to a bank account, but also to money. It was also agreed that the last sentence of paragraph 17 should be revised to explain that, if the balance in a bank account fell below the amount deposited, subsequent increases were unlikely to be proceeds of the original encumbered assets.

154. It was agreed that the last two sentences of paragraph 20 should be revised to refer to the quantity of the mass, as article 11, paragraph 2, limited the right to a mass by reference to its quantity, and not to its value.

155. With respect to paragraph 21, it was agreed that it should be revised to explain that the limit of a security right in a product under article 11, paragraph 3, related to value rather than to quantity, because the components of a mass could be counted (such as the number of litres of combined oil in the example in paragraph 20), but such counting was impossible in a product.

156. It was agreed that paragraph 24 should be revised to explain that an agreement limiting the grantor's right to create a security right in a receivable did not prevent the security right from being effective.

157. It was agreed that paragraph 28 should be revised to explain the rationale for the limitation of the scope of the rule in article 13, paragraph 1, to the types of receivables listed in article 13, paragraph 3.

158. It was widely felt that paragraph 28 should explain that: (a) the interference with party autonomy under article 13, paragraph 1, was justified, in the case of trade receivables, by the need to promote access to credit with receivables as security, but not in the case of receivables arising from financial contracts (excluded from the Model Law under art. 1, para. 3 (d)) or loan receivables, in which there was a

justifiable reason for the debtor of those types of receivables to be able to control who its counter-party would be; and (b) under article 1, paragraph 3 (d), the Model Law applied to a payment right arising upon the termination of all outstanding transactions and, under article 13, paragraph 3 (d), the rule in article 13, paragraph 1, applied to such payment rights in line with the approach taken in article 4, paragraph 2 (b), and article 9, paragraph 3 (d), of the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[22] (the "Assignment Convention").

159. With respect to paragraph 29, it was agreed that the reference to article 14, in parentheses, was unnecessary and should be deleted.

160. With respect to paragraph 30, it was agreed that the reference to an accessory guaranty or suretyship should be qualified, as in some States such a guaranty or suretyship was a personal right that supported rather than secured payment.

161. It was agreed that paragraph 31 should be revised to explain briefly the reasons why article 14 did not include recommendation 25, subparagraphs (g) and (h), contained in the Secured Transactions Guide.

162. It was agreed that paragraph 35 should be revised to explain that, under article 16, a security right in a negotiable document extended to the assets covered by the document only if the issuer of the document was in possession of the assets when the security right was created.

163. Subject to the above-mentioned changes, the Commission adopted chapter II (Creation of a security right) (A/CN.9/914/Add.1, paras. 1-36).

4. Chapter III. Effectiveness of a security right against third parties
(A/CN.9/914/Add.1, paras. 37-53)

164. It was agreed that paragraph 42 should be revised to explain that the purpose of article 21 was to preserve the priority achieved by the first method of third-party effectiveness.

165. It was agreed that paragraph 46 should be revised to explain that the price should not be so high as to prevent a consumer from encumbering his or her assets to obtain credit, but not so low either as to dissuade a creditor from entering into the transaction in the first instance because the transaction costs of ensuring and monitoring the third-party effectiveness of its security right would exceed the benefits.

166. With respect to paragraphs 52 and 53, it was agreed that: (a) the heading should be revised to read along the following lines: "Additional considerations for States parties to certain conventions for negotiable instruments and certificated non-intermediated securities"; (b) paragraph 53 should be revised to read along the following lines: "A State that had enacted the Geneva Uniform Law (or the Bills and Notes Convention) might wish to note that a secured creditor in possession of a negotiable instrument or certificated non-intermediated security might have, in addition to its rights under the Model Law, the rights afforded by the Geneva Uniform Law (or the Bills and Notes Convention) where the instrument or the security

[22] General Assembly resolution 56/81, annex.

contained an endorsement contemplated by the Geneva Uniform Law (or the Bills and Notes Convention)".

167. Subject to the above-mentioned changes, the Commission adopted chapter III (Effectiveness of a security right against third parties) (A/CN.9/914/Add.1, paras. 37-53).

5. **Chapter IV. Registry system** (A/CN.9/914/Add.2, paras. 1-58 and A/CN.9/914/Add.3, paras. 1-82)

168. With respect to paragraph 2 of document A/CN.9/914/Add.2, it was agreed that the essence of the first sentence of footnote 8 to the Model Law should be reflected to more clearly explain that, if the Model Registry Provisions were enacted in a separate law or other instrument, their enactment and entry into force should be coordinated so that they would enter into force simultaneously with the enactment of the Model Law and at a time when the Registry would be operational.

169. It was agreed that paragraph 3 of document A/CN.9/914/Add.2 should be revised to make a stronger recommendation for a fully electronic registry system in which notices could be submitted, stored and searched electronically.

170. A suggestion to delete paragraph 17 of document A/CN.9/914/Add.2 in its entirety did not receive support.

171. With respect to paragraph 19 of document A/CN.9/914/Add.3 and in other parts of the draft guide to enactment where reference was made to an article of the Model Law being "based on" another text, it was agreed that those words should be reviewed for accuracy and perhaps replaced with more general wording.

172. With respect to paragraph 22 of document A/CN.9/914/Add.3, it was agreed that the statement in the last sentence would not be true in all cases, and thus should be qualified along the following lines: "This option is predicated on the rationale that such a claimant generally may not have been prejudiced by relying on the unauthorized registration."

173. It was agreed that paragraph 34 of document A/CN.9/914/Add.3 should be deleted in its entirety, as it explained an approach that was not taken in the Model Law.

174. With respect to paragraph 42 of document A/CN.9/914/Add.3, it was agreed that the third and fourth sentences should be deleted, and instead the paragraph should: (a) refer to the two situations in which the secured creditor could select a registration period that would be too long or too short as described in paragraph 215 of the *UNCITRAL Guide on the Implementation of a Security Rights Registry*;[23] and (b) explain that article 24, paragraph 6, would rarely have any effect.

175. Subject to the above-mentioned changes, the Commission adopted chapter IV of the draft guide to enactment (A/CN.9/914/Add.2, paras. 1-58 and A/CN.9/914/Add.3, paras. 1-82).

[23] United Nations publication, Sales No. E.14.V.6.

6. **Chapter V. Priority of a security right** (A/CN.9/914/Add.4, paras. 1-80)

176. It was agreed that paragraph 74 would be deleted as it provided an explanation of what the Model Law did not address, which was unnecessary. In lieu of paragraph 74, it was agreed that paragraph 73 should include a reference to article 1, paragraph 3 (b), of the Model Law and paragraph 204 of the *Supplement on Security Rights in Intellectual Property*,[24] to clarify that article 50 would not apply to security rights in intellectual property insofar as it was inconsistent with the law of the enacting State relating to intellectual property.

177. With respect to paragraph 78, it was agreed that the reference to the applicable law in the second sentence should be replaced by a reference to "the law of the enacting State" rather than to the law applicable under article 100, as that sentence was not intended to deal with a conflict-of-laws issue.

178. Subject to the above-mentioned changes, the Commission adopted chapter V of the draft guide to enactment (A/CN.9/914/Add.4, paras. 1-80).

7. **Chapter VI. Rights and obligations of the parties and third-party obligors** (A/CN.9/914/Add.5, paras. 1-51)

179. It was agreed that paragraph 1 should be revised to clarify that: (a) chapter VI applied to the rights and obligations of the parties before or after default, while chapter VII applied only to post-default rights and obligations of the parties; and (b) while, under article 3, the provisions of section II of chapter VI were not mandatory, the grantor and the secured creditor could not modify the rights and obligations of the debtor of the receivable or other third-party obligor without its consent, except to the extent provided in the provisions of section II of chapter VI (e.g., art. 63).

180. It was agreed that paragraph 6 should be revised to clarify that: (a) any additional cost for returning the encumbered asset to the grantor or a person designated by the grantor would generally be borne by the grantor; (b) whether that cost was reasonable should be subject to the standard of article 4; and (c) while article 54 was a mandatory provision, the allocation of the cost for returning the asset to the grantor or a person designated by the grantor was subject to party autonomy.

181. With respect to paragraph 11, it was agreed that the grantor had a right to request and obtain information from the secured creditor irrespective of the method by which the security right was made effective against third parties, and thus the reference to the contrary in the second sentence should be deleted.

182. With respect to paragraph 15, it was agreed that the fourth and fifth sentences, referring to implicit and explicit agreements, should be deleted. It was widely felt that those sentences dealt with a matter of contract law and was not specific to article 57.

183. With respect to paragraph 28, it was agreed that: (a) the example referring to successive security rights was very complex and potentially misleading, and should thus be deleted; and (b) the example referring to successive outright assignments should be retained and further clarified.

[24] United Nations publication, Sales No. E.11.V.6.

184. With respect to paragraph 33, it was agreed that: (a) the example in the third sentence should be revised to refer to successive outright transfers of receivables; and (b) the last sentence should be revised to state that article 63, paragraphs 8 and 9, provided ways for the debtor of the receivable to ensure that it would not make payment to the wrong person in those circumstances.

185. With respect to paragraph 41, it was agreed that: (a) the reference to the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)[27] in the first sentence should be deleted, as paragraph 41 dealt with article 65, paragraph 3, which was based on article 19 of the Assignment Convention; and (b) the last sentence should clarify why the debtor of the receivable should not be able to waive defences based on its incapacity or fraud committed by the secured creditor.

186. With respect to paragraph 49, it was agreed that: (a) the last sentence should be replaced with a reference to the discussion in the Secured Transactions Guide (chap. VII, para. 34); and (b) an additional reference should be made to paragraph 37, which dealt with the rights of set-off of the debtor of the receivable (art. 64, para. 1(b)).

187. Subject to the above-mentioned changes, the Commission adopted chapter VI of the draft guide to enactment (A/CN.9/914/Add.5, paras. 1-51).

8. **Chapter VII. Enforcement of a security right** (A/CN.9/914/Add.5, paras. 52-96)

188. With respect to paragraph 58, it was agreed that the phrase "judicial or similar proceedings may not be efficient" should be replaced with the phrase "judicial or similar proceedings may be efficient".

189. With respect to paragraph 59, it was agreed that the discussion of the extrajudicial exercise of post-default rights should be complemented by a reference to article 3, paragraph 3, which dealt with alternative dispute resolution.

190. With respect to paragraph 67, it was agreed that the first sentence should be revised along the following lines: "Under paragraph 2, the right to terminate enforcement is extinguished once the relevant enforcement process is completed or a third party has acquired rights in the asset."

191. With respect to paragraph 69, it was agreed that the last sentence should be revised along the following lines: "This is so because the enforcement process has advanced so far that there is no merit in the higher-ranking secured creditor taking over the process."

192. It was agreed that paragraph 73 should be revised to explain that, whether it was the grantor or a third person, the person in possession of the encumbered asset was unlikely to raise unfounded objections, as such an objection might expose that person to liability to pay the additional costs incurred by the secured creditor in having to seek judicial assistance. It was widely felt that the risk of a breach of contract would not prevent the debtor or grantor already in breach of contractual obligations from raising unfounded objections.

[27] General Assembly resolution 43/165, annex.

193. With respect to paragraph 75, it was agreed that: (a) the more important rationale to be set out first was that, if the higher-ranking secured creditor had obtained possession through enforcement, the lower-ranking secured creditor should not be able to obtain possession from the higher-ranking secured creditor and thus interfere with the exercise of the enforcement rights of the higher-ranking secured creditor; and (b) the fifth sentence should include a reference to paragraph 90 (the last sentence of which suggested how States could implement article 81, paragraph 1) and explain that the conclusion reached in that sentence would only be accurate in States that enacted article 81, paragraph 1, as suggested in paragraph 90.

194. It was agreed that paragraph 76 should be revised to: (a) discuss the relationship between the right of the secured creditor to obtain possession and the right of the secured creditor to dispose of an encumbered asset (in particular, that a secured creditor might dispose of an encumbered asset without taking possession); and (b) clarify that article 78 applied also to intangible assets, with respect to which the concept of "possession" had no application.

195. It was agreed that paragraph 79 should be revised to refer to: (a) the grantor and other addressees of the notice; and (b) the notice, rather than the proposal, of the secured creditor's intention to dispose of the encumbered asset extrajudicially.

196. With respect to paragraph 80, it was agreed that the last two sentences should be revised to refer to an organized market related to a type of asset within the scope of the Model Law (e.g., a commodity exchange, rather than to a stock exchange in which intermediated securities would typically be traded that were not within the scope of the Model Law).

197. With respect to paragraph 81, it was agreed that the last sentence should be expanded to include reference to article 81, paragraph 2.

198. It was agreed that paragraphs 87 and 88 should be revised to avoid suggesting that the grantor might not have an interest in objecting to the secured creditor's proposal to acquire the asset in total or partial satisfaction of the secured obligation. It was widely felt that, if the encumbered asset's value was higher than the amount of the secured obligation, the grantor might object in order to claim any surplus. It was also generally felt that other addressees of the proposal, such as other secured creditors, might have an interest in objecting irrespective of whether the secured obligation was fully or partially discharged through the acquisition of the encumbered asset by the enforcing secured creditor.

199. Subject to the above-mentioned changes, the Commission adopted chapter VII of the draft guide to enactment (A/CN.9/914/Add.5, paras. 52-96).

9. Chapter VIII. Conflict of laws (A/CN.9/914/Add.6, paras. 1-58)

200. It was agreed that paragraph 4 should be revised to clarify that the parties were permitted to select the law applicable to their mutual obligations as article 84 permitted a choice of law, and not because article 84 was non-mandatory.

201. It was agreed that paragraph 10 should be revised to clarify that a motor vehicle would always be treated as a mobile asset, irrespective of whether it actually crossed national borders.

202. It was agreed that paragraph 24 should explain that, even though under article 91, the applicable law would change as a result of a change in the connecting factor, the third-party effectiveness of a security right could be preserved under article 23 if the law of an enacting State became applicable.

203. It was agreed that paragraph 41 should be revised to clarify that the location of the relevant branch could be easily located in most, but not all, cases. It was agreed that both paragraphs 41 and 42 should be revised to refer to the different expectations of the parties.

204. With respect to paragraphs 46 and 48, it was agreed that the last sentence should be deleted, as it was either not fully accurate or specific to article 50, which dealt with security rights in intellectual property.

205. Subject to the above-mentioned changes, the Commission adopted chapter VIII of the draft guide to enactment (A/CN.9/914/Add.6, paras. 1-58).

206. In the context of the discussions on article 85, the question was raised whether article 85 or article 86 would apply to electronic negotiable instruments and electronic negotiable documents and thus whether the applicable law would be the law of the location of the asset or of the grantor. It was widely felt that the answer would depend on whether electronic negotiable instruments and negotiable documents were treated as tangible or intangible assets.

207. In that connection, it was noted that negotiable instruments and negotiable documents were listed in the definition of the term "tangible asset" in article 2, subparagraph (ll), of the Model Law as examples of tangible assets since the Model Law had been prepared against the background of negotiable instruments and negotiable documents in their paper form. It was also noted that that the term "possession" was defined in article 2, subparagraph (z), of the Model Law as meaning "the actual possession of a tangible asset". Thus, for specific policy considerations of secured transactions law, the provisions of the Model Law that referred to "possession" of a negotiable instrument or negotiable document (for example, arts. 16, 26, 46 and 49) were meant to apply only to negotiable instruments and negotiable documents in their paper form. It was also noted that the Model Law did not include definitions of the terms "negotiable instrument" or "negotiable document", thus leaving their meaning to the law of the enacting State relating to negotiable instruments and negotiable documents, to which the Model Law deferred also for the rights and obligations of a person obligated on a negotiable instrument or the issuer of or other person obligated on a negotiable document (see arts. 68 and 70).

208. After discussion, it was agreed that, for reasons of clarity: (a) paragraph 65 of document A/CN.9/914 should list negotiable instruments and negotiable documents in their paper form as examples of tangible assets; (b) paragraph 46 of document A/CN.9/914 should list electronic negotiable instruments and negotiable documents as examples of intangible assets; and (c) the draft guide to enactment should clarify that negotiability was left to other laws of the enacting State relating to negotiable instruments and negotiable documents.

209. The Commission next considered the relationship between the UNCITRAL Model Law on Secured Transactions and the UNCITRAL Model Law on Electronic Transferable Records (see chapter III, section A, above, and annex I to the present report). It was widely felt that the Model Law on Electronic Transferable Records was

not intended to revise the substantive provisions of other laws but rather to facilitate the use of transferable documents or instruments in electronic form by providing rules on achieving the functional equivalent of possession. In particular, it was generally felt that article 11 of the Model Law on Electronic Transferable Records was not intended to change the concept of "possession" under the Model Law on Secured Transactions, which was intended to apply to tangible assets such as negotiable instruments and negotiable documents in paper form. Another view was that the plain meaning of article 11 of the Model Law on Electronic Transferable Records made the concept of "control" the functional equivalent of "possession" for the purposes of the Model Law on Secured Transactions.

210. After discussion, it was agreed that paragraph 53 of document A/CN.9/914 should: (a) clarify that the concept of "possession" in the Model Law on Secured Transactions applied only to tangible assets, and thus the provisions of that Model Law that applied specifically to tangible assets did not apply to negotiable instruments and negotiable documents in electronic form, to which the general provisions on general intangible assets of the Model Law would apply as they were movable assets in the sense of article 2, subparagraph (u); and (b) suggest that States that wished to enact both model laws should consider the relationship between them.

10. Chapter IX. Transition (A/CN.9/914/Add.6, paras. 59-83)

211. With respect to paragraph 69, it was agreed that it should be: (a) revised to clarify that the reference to article 103, paragraph 2, in the first sentence was to article 103, paragraph 1; and (b) placed after, or incorporated in to, paragraph 67, which also dealt with article 103, paragraph 1.

212. It was agreed that paragraph 74 should be deleted in its entirety as it discussed matters dealt with in paragraphs 75 and 77.

213. With respect to paragraph 78, it was agreed that the last sentence should be deleted as it could be misleading.

214. It was agreed that paragraph 83 should be revised to emphasize that: (a) the registry had to be operational before the law entered into force; (b) in determining when the new law would enter into force, States should take into account the criteria set out in subparagraphs (a), (c) and (d) in the third sentence, as well as the novelty of the new law and the complexity of the relevant markets of the enacting State; and (c) the mechanisms to determine the time when the new law should enter into force should be moved from the last sentence of paragraph 83 to paragraph 82, without any reference to specific time periods.

215. Subject to the above-mentioned changes, the Commission adopted chapter IX of the draft guide to enactment (A/CN.9/914/Add.6, paras. 59-83).

11. Adoption of the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions

216. At its 1067th meeting, on 20 July 2017, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recalling also General Assembly resolutions 56/81 of 12 December 2001, 63/121 of 11 December 2008, 65/23 of 6 December 2010 and 68/108 of 16 December 2013, in which the General Assembly recommended that States consider or continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[26] and giving favourable consideration to the *UNCITRAL Legislative Guide on Secured Transactions* (2007),[27] the *Supplement on Security Rights in Intellectual Property*[28] and the *UNCITRAL Guide on the Implementation of a Security Rights Registry*,[29] respectively,

Recalling further that, at its forty-ninth session, in 2016, the Commission adopted the UNCITRAL Model Law on Secured Transactions[30] and that the General Assembly, in its resolution 71/136 of 13 December 2016, recommended the Model Law for use by States,

Convinced that the overarching benefits of the Model Law include an increase in access to affordable credit, the facilitation of the development of international trade and greater legal certainty in the exercise of international commercial activities,

Noting that a number of issues were referred to a draft guide to enactment of the Model Law during the deliberations of the Model Law and that, at its forty-ninth session, in 2016, the Commission agreed to give Working Group VI (Security Interests) up to two sessions to complete its work on the draft guide to enactment and submit it to the Commission for final consideration and adoption at its fiftieth session, in 2017,[31]

Noting also that the Working Group devoted two sessions, in 2016 and 2107, to the preparation of the draft guide to enactment,[32] and that, at its thirty-first session, in 2017, the Working Group approved the substance of the

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[26] General Assembly resolution 56/81, annex. Also available as United Nations publication, Sales No. E.04.V.14.

[27] United Nations publication, Sales No. E.09.V.12.

[28] United Nations publication, Sales No. E.11.V.6.

[29] United Nations publication, Sales No. E.14.V.6.

[30] United Nations publication, Sales No. E.17.V.1.

[31] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 122.

[32] For the reports of those sessions of the Working Group, see A/CN.9/899, and A/CN.9/904.

draft guide to enactment and decided to submit it to the Commission for final consideration and approval at its fiftieth session,[33]

Noting further with satisfaction that the draft guide to enactment provides background and explanatory information that could assist States in revising or adopting legislation relevant to secured transactions on the basis of the Model Law, and thus a guide to enactment of the Model Law would be an extremely important text for the implementation and interpretation of the Model Law, [34]

Expressing its appreciation to international intergovernmental and non-governmental organizations active in the reform of secured transactions law for their participation in and support for the development of the Model Law and the draft guide to enactment,

Having considered the draft guide to enactment at its fiftieth session, in 2017,

Considering that the draft guide to enactment has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States,

1. *Adopts* the *Guide to Enactment of the UNCITRAL Model Law on Secured Transactions*, consisting of the text contained in document A/CN.9/914 and Add.1-6, with amendments adopted by the Commission at its fiftieth session, and authorizes the Secretariat to edit and finalize the text of the Guide to Enactment of the Model Law pursuant to the deliberations of the Commission at that session;

2. *Requests* the Secretary-General to publish the Guide to Enactment of the Model Law, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law, taking also into account the information in the Guide to Enactment, when revising or adopting legislation relevant to secured transactions, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that, where necessary, States continue giving favourable consideration to the *UNCITRAL Guide on the Implementation of a Security Rights Registry* when revising relevant legislation, administrative regulations or guidelines, and to the *UNCITRAL Legislative Guide on Secured Transactions* and the *Supplement on Security Rights in Intellectual Property* when revising or adopting legislation relevant to secured transactions, and invites States that have used the guides to advise the Commission accordingly;

5. *Further recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001), the principles of which are also reflected

[33] A/CN.9/904, para. 135.

[34] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 121.

in the Model Law, and the optional annex of which refers to the registration of notices with regard to assignments.

217. The Commission was informed that the Model Law had been made available as a United Nations publication and that the Guide to Enactment would be made available as a separate United Nations publication, as there was no budget to publish both the Model Law and the Guide to Enactment again. It was further noted that the Model Law and the Guide to Enactment would be made available on the UNCITRAL website at different times.

B. Possible future work in the area of security interests

218. The Commission held a preliminary discussion regarding future work in the area of security interests. The conclusions reached during that preliminary discussion were reaffirmed by the Commission upon its consideration of agenda item 21 (Work programme of the Commission) (see chapter XVII below).

219. The Commission recalled that, at its forty-ninth session, in 2016, it had decided that the preparation of a contractual guide on secured transactions and a uniform law text on intellectual property licensing should be retained in its future work programme together with the following topics: (a) whether the Model Law and its Guide to Enactment might need to be expanded to address matters related to secured finance to micro, small and medium-sized enterprises; (b) whether any future work on a contractual guide on secured transactions should include a discussion of contractual issues of concern to such enterprises (e.g., transparency issues); (c) any question that might not have already been addressed in the area of warehouse receipt financing (e.g., the negotiability of warehouse receipts); and (d) whether disputes arising from security agreements could be resolved through alternative dispute resolution mechanisms. The Commission also recalled that it had decided that those issues should be considered at a future session on the basis of notes to be prepared by the Secretariat after a colloquium or expert group meeting.[55]

220. At the current session, the Commission had before it two notes by the Secretariat (A/CN.9/913 and A/CN.9/924) reflecting the deliberations and conclusions of the Fourth International Colloquium on Secured Transactions, which had been held in Vienna from 15 to 17 March 2017. The Commission took note of the possible future legislative work topics presented in document A/CN.9/913, which included contractual, transactional and regulatory issues related to secured transactions, finance to micro-businesses, warehouse receipts, intellectual property licensing, alternative dispute resolution in secured transactions and real estate financing. In particular, the Commission noted the desirability and feasibility of work on each topic, as well as the issues possibly to be addressed and the form such work might take. In that connection, the Commission noted that, in view of its limited resources, work could not be undertaken on all possible topics and priorities would thus need to be set.

221. In addition, the Commission considered a proposal by Australia, Canada, Japan and the United Kingdom (A/CN.9/926) that the Commission should prepare a practice

[55] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 124 and 125.

guide for potential users of the Model Law with respect to contractual, transactional and regulatory issues related to secured transactions, as well as financing of micro-businesses. It was noted that the proposal referred to a number of issues addressed in document A/CN.9/913.

222. There was general support in the Commission for the preparation of such a practice guide. It was stated that the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions, adopted by the Commission at the current session (see section A of the present chapter), was mainly addressed to legislators and not to users of laws implementing the Model Law. In addition, it was said that, to be able to use a law implementing the Model Law to their benefit, parties to transactions, judges, arbitrators, regulators, insolvency administrators and academics would need some guidance with respect to contractual issues, such as the types of secured transactions that were possible under that law, transactional issues such as the valuation of collateral, and regulatory issues such as the conditions under which movable assets were treated as eligible collateral for regulatory purposes.

223. Moreover, it was pointed out that, in many States that had adopted a modern secured transactions law along the lines of the Model Law, users were not able to use it to the full extent and thus obtain access to lower-cost credit. It was also mentioned that the financing of micro-businesses raised some special issues (for example, with respect to notifications under the Model Law and the enforcement of a security interest). The proposed practice guide could provide useful guidance on those issues. It was further stressed that the overall value of the Model Law and of other texts prepared by UNCITRAL in the field of security interests would increase if they were complemented by a practice guide; that, it was said, would be the best use of the resources already devoted by the Commission to the preparation of its texts on security interests.

224. At the same time, in view of the limited resources available to the Commission, some doubts were expressed as to whether work on security interests should continue. It was stated that it might be better to refer the preparation of the proposed practice guide to the Secretariat with the assistance of experts and that the Commission could consider the text thus prepared at a future session.

225. With respect to warehouse receipts, the suggestion was made that the Secretariat should prepare a study on the feasibility and desirability of preparing an international legal standard. With respect to intellectual property licensing, the suggestion was made that the Commission might prepare a text on contractual issues, given their importance and the fact that there were gaps in the law relating to them. With respect to the use of alternative mechanisms to resolve disputes arising in the context of secured transactions, it was suggested that model rules might be prepared to address arbitrability and third-party issues. Those suggestions did not receive sufficient support for immediate referral to a working group. The Commission was informed that a delegation intended to prepare and submit a study on warehouse receipts for future consideration by the Commission.

226. The Commission took note of possible future coordination and technical assistance work on security interests and related topics (see A/CN.9/924). Recalling its discussion on coordination and cooperation activities in the area of security interests (see chapter XIV, section A, below), the Commission renewed the mandate given to the Secretariat to continue its coordination and cooperation efforts with the

European Commission with a view to ensuring a coordinated approach to the issue of the law applicable to third-party effects of transactions in receivables and securities. That mandate also included coordination and cooperation with international banking regulatory authorities.

227. After discussion, the Commission decided that a practice guide on secured transactions should be prepared and referred that task to Working Group VI. It was also agreed that the issues addressed in document A/CN.9/926 and the relevant sections of document A/CN.9/913 should form the basis of that work. The Commission further agreed that broad discretion should be accorded to the Working Group in determining the scope, structure and content of the practice guide.

228. With respect to the time frame, it was generally felt that at the current stage it was premature to fix the number of meetings the Working Group might need to complete its work, but the Commission requested the Working Group to proceed as expeditiously as possible. It was agreed that the date and place of future meetings of Working Group VI would be discussed under agenda item 22 (Date and place of future meetings). (For further consideration of the matter, see chapter XX below.)

229. With respect to the other future work topics discussed in document A/CN.9/913, the Commission decided that, with the exception of real estate financing, those topics should be retained on the Commission's future work agenda for further discussion at a future session, without assigning any priority to them.

V. Consideration of issues in the area of micro, small and medium-sized enterprises: progress report of Working Group I

230. The Commission had before it the reports of Working Group I Micro, Small and Medium-sized Enterprises on the work of its twenty-seventh and twenty-eighth sessions (A/CN.9/895 and A/CN.9/900, respectively) outlining progress on the two topics on its current work agenda, each of which involved the preparation of a legislative guide "aimed at reducing the legal obstacles faced by micro, small and medium-sized enterprises throughout their life cycle and, in particular, those in developing economies" [36] in respect of:

(a) The creation of a simplified business entity;

(b) Key principles of business registration.

231. The Commission noted that Working Group I, at its twenty-seventh session, held in Vienna from 3 to 7 October 2016, had continued its deliberations regarding the creation of a simplified business entity by considering the draft legislative guide on an UNCITRAL limited liability organization (UNLLO) (as set out in A/CN.9/WG.I/WP.99 and Add.1). Progress at that session had included discussion of section A, on general provisions (draft recommendations 1 to 6), section B, on the formation of an UNLLO (draft recommendations 7 to 10), and section C, on the

[36] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 220, 225 and 340; and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 219.

organization of an UNLLO (draft recommendations 11 to 13). The Working Group had also heard the presentation of a legislative approach known in France as "Entrepreneur with limited liability" (A/CN.9/WG.I/WP.94), which represented a possible alternative legislative model applicable to micro and small businesses.

232. The Commission further noted that the Working Group had considered both topics currently on its agenda during its extended twenty-eighth session, held in New York from 1 to 9 May 2017. Those deliberations had commenced with a review of the entire consolidated draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.101), save for the introductory section and draft recommendation 9 (Core functions of business registries) and its attendant commentary, to which the Working Group had agreed to revert at a future session. The Commission noted that the Working Group had further agreed to again consider the draft legislative guide on key principles of a business registry, as revised, at its twenty-ninth session, to be held in Vienna in 2017, with a view to its possible adoption by the Commission at its fifty-first session, in 2018. With respect to its deliberations regarding the creation of a simplified business entity, the Working Group had continued the work begun at its twenty-seventh session and considered the following recommendations (and related commentary) of the draft legislative guide on an UNLLO: section D, on managers (draft recommendations 14 to 16), section E, on contributions (draft recommendations 17 and 18), and section F, on distributions (draft recommendations 19 to 21).

233. The Commission also noted two proposals that had been made by States at the twenty-eighth session of the Working Group, the first being a proposal on possible future work on contractual networks, which was before the Commission at its current session (A/CN.9/925; see chapter XVII below), and the second being a proposal that the Working Group should attach model provisions on the dissolution and liquidation of micro, small and medium-sized enterprises as an annex to the legislative guide on an UNLLO (A/CN.9/WG.I/WP.104, containing the model provisions in an annex). In respect of the latter proposal, it was noted that the Working Group had agreed that any further consideration of that proposal should first be subject to domestic consultations and considered at a future session of the Working Group in conjunction with its deliberations regarding recommendation 24 (and related commentary) of the draft legislative guide on an UNLLO, regarding issues related to dissolution and winding-up of an UNLLO.

234. Several delegations highlighted the importance of the efforts of Working Group I to prepare legal standards aimed at reducing the administrative and legal burdens faced by micro, small and medium-sized enterprises, in particular in the light of the key role that such enterprises played in economies around the world, including in those of developing States. Confidence was expressed that the efforts of the Working Group would have a positive impact on such enterprises, and that the role of such norms in establishing a simple and sound system to support such businesses could have key economic benefits. It was further observed that efforts to reduce the obstacles faced by micro, small and medium-sized enterprises were likely to have a positive effect for enterprises of all sizes.

235. After discussion, the Commission commended the Working Group for the progress it had made on the two topics as reported above. In particular, the Commission welcomed the potential completion of the draft legislative guide on key principles of a business registry for possible adoption at the fifty-first session of the Commission. It noted that, consistent with the principles contained in General

Assembly resolutions on the work of UNCITRAL,[37] the legislative texts resulting from the current work of the Working Group on those two topics should be published, including electronically, and in the six official languages of the United Nations, and be disseminated to Governments and other interested bodies.

VI. Consideration of issues in the area of international dispute settlement

A. Progress report of Working Group II

236. The Commission recalled that, at its forty-seventh session, in 2014, it had agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission on the feasibility and possible form of work in that area. At that session, the Commission had also invited delegations to provide information to the Secretariat in respect of that subject matter.[38]

237. The Commission also recalled that, at its forty-eighth session, in 2015, it had before it a compilation of responses received by the Secretariat (A/CN.9/846 and addenda).[39] At the same session, it had agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. The Commission had also agreed that the mandate of the Working Group with respect to that topic should be broad, to take into account the various approaches and concerns.[40] At its forty-ninth session, in 2016, the Commission had commended the Working Group for its work on the topic and confirmed that the Working Group should continue its work.[41]

238. At the current session, the Commission considered the reports of the Working Group on the work of its sixty-fifth session (A/CN.9/896), held in Vienna from 12 to 23 September 2016, and sixty-sixth session (A/CN.9/901), held in New York from 6 to 10 February 2017. The Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (A/CN.9/901, para. 52) and expressed support for the Working Group to continue pursuing its work based on that compromise.

239. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat. Considering the progress made, the Commission requested the Working Group to complete the work expeditiously.

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[37] For example, General Assembly resolution 70/115, paras. 16 and 21.

[38] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.

[39] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 135.

[40] Ibid., para. 142.

[41] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 165.

B. Possible future work in the area of international dispute settlement

240. The Commission held a preliminary discussion regarding future work in the area of international dispute settlement. The conclusions reached during that preliminary discussion were reaffirmed by the Commission upon its consideration of agenda item 21 (Work programme of the Commission) (see chapter XVII below).

241. The Commission recalled that, at its forty-ninth session, in 2016, it had considered three topics for possible future work: concurrent proceedings, the preparation of a code of ethics for arbitrators, and possible reform of the investor-State dispute settlement regime.[42] At that session, the Commission had decided to retain those topics on its agenda for further consideration. It had further requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all those topics so that the Commission would be in a position to make an informed decision whether to undertake work in any of the topics.

242. At its current session, the Commission had before it notes by the Secretariat on possible future work on concurrent proceedings (A/CN.9/915) and ethics (A/CN.9/916) in international arbitration, as well as on possible reforms of investor-State dispute settlement (A/CN.9/917), including a compilation of comments by States and international organizations (A/CN.9/918 and addenda). The Commission agreed to proceed with the consideration of possible reforms, taking those notes into account. For deliberation purposes it was agreed that the topic of investor-State dispute settlement reform would be considered in a comprehensive manner to also include the topics of concurrent proceedings and ethics.

243. At the outset, it was suggested that UNCITRAL should undertake work on investor-State dispute settlement reform as a matter of priority, as there was a need to identify issues in relation to the existing settlement mechanism, to discuss whether those issues needed to be addressed and, if so, to develop any relevant solutions. As a general point, it was stressed that the main objective of that work should be to restore confidence in the overall system. It was underlined that there was value in multilateral consideration of the issues so as to avoid further fragmentation of the investor-State dispute settlement regime.

244. However, some doubts were expressed on the desirability and feasibility of UNCITRAL undertaking work on possible investor-State dispute settlement reforms. It was highlighted that there was currently a diverse body of more than 3,000 international investment agreements with significantly different approaches to both substantive investment protection and investor-State dispute settlement mechanisms. It was underlined that the diversity in approaches to investor-State dispute settlement reflected thoughtful decisions by sovereign States on what approach best suited their particular legal, political, and economic circumstances. It was said that because of those well-founded differences, past attempts to forge a single, multilateral approach to investment treaties had failed (for example, the negotiation of the multilateral agreement on investment under the auspices of OECD). In response, it was suggested that, although international investment agreements were not identical to and, indeed, contained differences, they generally followed similar patterns with regard to their structure and were centred around a number of core

[42] Ibid., paras. 174-195.

principles. It was stated that reforms to investor-State dispute settlement might enhance consistency in treaty interpretation and application.

245. In expressing further doubts, it was suggested that the diversity of approaches on investor-State dispute settlement needed to be respected. It was pointed out that reform was neither something new nor something that could be pursued only multilaterally, as States had advanced investor-State dispute settlement reform in myriad ways for many years. Some States had elected to modify and supplement existing arbitral rules, some had chosen to limit or eliminate access to arbitration, while others had elected to do away with investment treaties altogether. In that context it was suggested that discussions in international forums about approaches to investor-State dispute settlement reform were useful where that work was targeted at empirical research, experience-sharing and capacity-building to help countries identify and implement approaches that best suited their individual circumstances.

246. It was stated that criticism about investor-State dispute settlement was mainly based on perceptions and that work by UNCITRAL should not be undertaken based on mere perceptions, but on facts. In response, it was pointed out that the numerous studies on investor-State dispute settlement were based on empirical data and surveys.

247. The prevailing view was that UNCITRAL should undertake work on investor-State dispute settlement reform. Views expressed ranged from those fully supportive of conducting future work on the topic, those generally in favour of having an open-ended discussion at UNCITRAL and those who did not object to proceeding with future work but were cautious about the approach to be undertaken. As to the possible method of undertaking work on investor-State dispute settlement reform, the following suggestions were outlined.

248. As a first step, it was stated that work should begin with identifying underlying issues and concerns in order to provide the rationale for any proposed reforms and to proceed with the development of possible solutions.

249. It was suggested that work should build on an in-depth analysis and assessment of existing international investment agreements and investor-State dispute settlement mechanisms; it should not simply identify the problems but also ascertain the positive aspects and benefits of the current regime. It was underlined that a wealth of studies already existed from academia, civil society and international organizations that would assist in the consideration of the matter. It was further suggested that the work should be fact-driven rather than perception-driven and should aim at outlining the advantages and drawbacks of the different solutions.

250. It was stressed that work should be conducted through a Government-led process where States would be able to openly discuss and consider a wide range of issues. It was noted that investor-State dispute settlement reform was connected with a number of policy issues and that Governments should have a leading role in that process. In that context, it was also noted that there was a need to take into account that States had different experiences and expectations with regard to the investor-State dispute settlement regime. The need for Governments to be represented by officials with adequate expertise and experience in negotiating investment treaties or investment chapters in free trade agreements and with exposure to claims related to investor-State dispute settlement was highlighted.

251. While the need for the process to be government-led was highlighted in particular, the need to engage with diverse stakeholders was similarly stressed. The participation in the process of intergovernmental organs and organizations (such as UNCTAD, the World Trade Organization (WTO), OECD, ICSID and PCA) and non-governmental organizations that had accumulated a vast amount of experience in that area was underscored. The benefits of involving experts, investors, academia and practitioners were noted.

252. It was generally agreed that discussion on investor-State dispute settlement reforms should be undertaken without prejudging the outcome and should not exclude any specific options. There was a general preference that work should cover the widest range of issues and possible solutions. It was generally stated that any investor-State dispute settlement reform should be conducted in a gradual manner. In that context it was stated that work by UNCITRAL should not rush to hasty conclusions about the need for reform or solutions for addressing issues.

253. It was also stated that any future work on the topic should be without any prejudice to possible approaches States might wish to adopt in the future. States had different perspectives, and diversity in approaches should be duly respected. It was mentioned that participation of States in the process should not be construed as a commitment to the result of the work.

254. There was general support that the working group tasked with the topic of investor-State dispute settlement reform should determine the specific issues to be considered. While a few suggested that future work should focus only on the topics of concurrent proceedings and ethics, it was generally felt that work on concurrent proceedings and a code of ethics could form part of the discussions on investor-State dispute settlement reforms. In relation to concurrent proceedings, it was mentioned that work could be considered on guidance to arbitral tribunals and to the manner in which the matter had been addressed in international investment agreements. Regarding the topic of ethics, it was highlighted that aspects mentioned in paragraphs 38 and 39 of document A/CN.9/916 would deserve further consideration. It was further suggested that work on ethics could address the conduct of various participants in the arbitral process, not just arbitrators.

255. As a possible solution for investor-State dispute settlement reform, a significant number of references were made to the establishment of a permanent multilateral investment court. It was suggested that, while not being the only possible solution, the idea of a permanent multilateral investment court should be given due consideration. It was suggested that one feature of a permanent multilateral investment court might be a built-in appellate mechanism. In that context, the possibility of establishing regional courts was mentioned.

256. Other topics mentioned for possible discussion by a working group included the appointment or selection of judges or arbitrators, an appeal or review mechanism, the seat of arbitration, applicable law and fees, as well as overall cost of investor-State dispute settlement and the nature and enforcement of awards or judgments. The suggestion was made that it would be useful to consider the role of domestic courts, State-to-State dispute settlement mechanisms and any other means of investment dispute resolution.

257. It was mentioned that work on investor-State dispute settlement reform should not be limited to procedural issues relating to investor-State dispute settlement but

should encompass a broader discussion on the substantive aspects of international investment agreements, including but not limited to States' right to regulate, fair and equitable treatment, expropriation and due process requirements. Nonetheless, it was stated that work on substantive standards was deemed less feasible than work on the procedural aspects.

258. Considering the above, the prevailing view was that UNCITRAL provided an appropriate multilateral forum to discuss relevant issues in an inclusive and transparent manner, where the interests not only of States but also of other stakeholders could be considered. It was recalled that UNCITRAL had successfully undertaken a reform of investor-State dispute settlement with the preparation of standards on transparency.

259. It was recalled that legislative work by UNCITRAL and its working groups was generally based on consensus. It was further recalled that, in accordance with UNCITRAL practice, consensus did not require unanimity, but was instead based on a widely prevailing majority and the absence of a formal objection that would trigger a request for a vote. The adoption of an instrument or a text by consensus did not give it any binding nature. It was stated that efforts should be made to consider all possible options so as to rally the broadest consensus.

260. While a few suggested that Working Group II should be tasked with investor-State dispute settlement reform upon completion of its work on the enforcement of settlement agreements resulting from international commercial conciliation, it was generally felt that it would be preferable to assign that work to another working group so as not to burden Working Group II unduly while it continued to fulfil its mandate.

261. The Commission had a preliminary discussion on the possible dates that could be allocated to a working group tasked with investor-State dispute settlement reform. While some expressed a preference for commencing work in 2018 so as to allow for consultations with domestic stakeholders and appropriate consideration of travel-related resources, there was also support for work to be undertaken with priority in 2017. (See chapter XX below for the final decision on that matter.)

262. The suggestion was made that the Secretariat should look into the possibility of holding working group sessions at locations other than Vienna and New York as a means to increase participation by States and relevant stakeholders. The Secretariat was requested to report back to the Commission on the administrative and financial implications of that suggestion.

263. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission decided on the mandate set out below.

264. The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement. In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led, with high-level input from all Governments, consensus-based and fully transparent. The Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.

The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s).

265. At the end of the deliberations on the topic of future work in the area of international commercial arbitration, a proposal was made that UNCITRAL should consider preparing model legislative provisions on adjudication. The proposal was based on experience in the construction industry and legislative developments in a number of jurisdictions that provided for recourse to an "adjudicator" for urgent resolution of disputes through summary proceedings. It was said that the introduction of such an adjudicator procedure required a legislative basis, in particular with respect to the enforcement of the interim decision issued by the adjudicator. Considering the lack of time, the Commission agreed that the proposal could be further presented and considered at its next session, in 2018.

VII. Consideration of issues in the area of insolvency law: progress report of Working Group V

266. The Commission had before it the reports of Working Group V on the work of its fiftieth and fifty-first sessions (A/CN.9/898 and A/CN.9/903, respectively), outlining progress on the following topics on its current work agenda:

(a) Facilitating the cross-border insolvency of multinational enterprise groups, pursuant to a mandate given by the Commission at its forty-third session;[45]

(b) Recognition and enforcement of insolvency-related judgments, pursuant to a mandate given by the Commission at its forty-seventh session;[46]

(c) Obligations of directors of enterprise group companies in the period approaching insolvency, pursuant to a mandate given by the Commission at its forty-third session;[47]

(d) The insolvency treatment of micro, small and medium-sized enterprises, pursuant to a mandate given by the Commission at its forty-seventh session, in 2014,[48] and clarified at its forty-ninth session, in 2016.[49]

267. With respect to the work on enterprise groups, the Commission noted with satisfaction that the Working Group had made significant progress in developing a draft text on that complex and technically challenging topic. The substance of chapters 2 (arts. 3-11, on cooperation and coordination), 3 (arts. 12-13, on conduct of planning proceedings in the enacting State) and 4 (arts. 14-20, dealing with recognition of foreign planning proceedings and relief) were already well developed. While the discussion in the Working Group had clarified the policy considerations to be addressed in chapter 5, which addressed the treatment of foreign claims and

[45] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259.
[46] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 135.
[47] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259.
[48] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 136.
[49] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

included optional articles (arts. 22, 22bis and 23), the drafting required some further consideration. The Commission also noted that, given the complexity of the subject matter, the text would need to be accompanied by a guide to enactment that not only explained the policy behind the provisions, but also included examples of how the provisions might work in practice. While it was possible that the draft provisions would be sufficiently developed for consideration and adoption by the Commission in 2018, it was unlikely that the guide to enactment could be completed for consideration at the same time.

268. With respect to the work on recognition and enforcement of insolvency-related judgments, the Commission noted with satisfaction the progress that had been made towards the development of a draft model law, as evidenced by the draft text attached as an annex to the report of the fifty-first session (A/CN.9/903). While a few issues remained to be resolved, including the final definition of the term "insolvency-related judgment", one of the grounds for refusal of recognition and the relationship between the draft model law and the UNCITRAL Model Law on Cross-Border Insolvency,[46] the Commission noted that the draft text, together with a guide to enactment (which was currently being prepared), might be finalized at the upcoming fifty-second session of the Working Group, in 2017, in time to be circulated to States for comment in anticipation of completion and adoption by the Commission in 2018. The Commission further noted the steps that had been taken to facilitate close coordination with the Hague Conference on Private International Law, including the Secretariat's attendance, in February 2017, at the Special Commission on the Recognition and Enforcement of Foreign Judgments. That coordination had enabled progress on the judgments project of the Hague Conference to be taken into consideration in the draft model law being developed by the Working Group. Stressing the importance of ensuring coordination with the work of the Hague Conference, the Commission encouraged the Secretariat to continue its efforts in that regard.

269. On the third topic of the obligations of directors of enterprise group companies in the period approaching insolvency, the Commission recalled that, while the work was already well developed, it would not be referred to the Commission for finalization and approval until the work on enterprise group insolvency was sufficiently advanced to be able to ensure that the two texts were consistent in their approaches. It was anticipated that if the work on enterprise groups were to be ready for consideration by the Commission in 2018, the text on directors' obligations could also be submitted for finalization.

270. The Commission welcomed the initial work that had been done on the topic of insolvency of micro, small and medium-sized enterprises. It noted in particular that the Working Group had organized, at its fifty-first session, a number of presentations on approaches to micro, small and medium-sized enterprise insolvency and, following those presentations, had held a preliminary discussion on how to approach the topic. The Commission further noted that the Working Group had agreed that the *UNCITRAL Legislative Guide on Insolvency Law*[47] provided an appropriate framework for structuring future work on the topic. That work could proceed by examining each of the topics addressed in the *Legislative Guide* and considering whether the treatment provided was appropriate and necessary for a micro, small and

[46] General Assembly resolution 52/158, annex.

[47] United Nations publication, Sales No. E.05.V.10.

medium-sized enterprise insolvency regime, building upon the brief outline provided in A/CN.9/WG.V/WP.121. Where such treatment was not found to be appropriate, consideration should be given to how it might need to be adjusted to micro, small and medium-sized enterprise insolvency. In addition, consideration should be given to issues not covered by the *Legislative Guide* that should nevertheless be addressed in a micro, small and medium-sized enterprise insolvency regime. The Commission took note that the work might be taken up in 2018 once work on some of the other topics on the current agenda of Working Group V had been finalized.

271. After discussion, the Commission commended the Working Group for the progress that was being made with its current work agenda, in particular for rising to the technical challenge posed by the various topics under consideration and for finding appropriate solutions, as reported above. The Commission requested the Secretariat to reflect, in its publications programme, the decisions to mandate work on those topics and to take any other measures necessary to ensure future publication of final texts resulting from that work, including in electronic form and in the six official languages of the United Nations.

VIII. Legal developments in the area of public procurement and infrastructure development

272. The Commission had before it a note by the Secretariat on possible future work in procurement and infrastructure development (A/CN.9/912). The Commission recalled its earlier consideration that it would be premature to engage in any type of legislative work on public procurement and infrastructure development, but that in the light of the continued importance of those topics, the Secretariat should (a) continue to monitor developments on suspension and debarment in public procurement and report periodically thereon to the Commission;[50] and (b) consider updating, where necessary, all or parts of the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2000),[51] involving experts.[52]

273. The Commission noted the importance of suspension and debarment procedures to effective systems of public procurement and in particular the avoidance of corruption. It was observed, however, that other organizations, including the United Nations Office on Drugs and Crime (UNODC) and OECD, were engaged in developing guidance on the issues involved. In order to avoid duplication of work, and taking into account that legislative development in UNCITRAL in that area was not considered feasible at present,[53] it was decided that the topic would not be added to the Commission's agenda in the near future. The Secretariat was authorized to conduct a further review of the topic at an appropriate time thereafter and, if that review indicated that legislative work might be desirable and feasible, report to the Commission accordingly.

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[50] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 361.

[51] United Nations publication, Sales No. E.01.V.4.

[52] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 359, 360 and 362.

[53] A/CN.9/912, para. 6.

274. The importance of public-private partnerships to States, particularly developing countries, was also highlighted. The Commission reaffirmed that the mandate to work on that topic should be limited, should not involve a working group, and should involve a Secretariat-led project to update, as necessary, the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*, involving experts. It was also recalled that the Commission had requested the Secretariat to consolidate the provisions of that *Legislative Guide* with the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003),[54] and noted that the Secretariat-led project included work to consolidate the texts accordingly. The Commission confirmed that the Secretariat should continue to update and consolidate the *Legislative Guide* and other relevant UNCITRAL materials, and should report further to the Commission, with draft texts as appropriate, at its fifty-first session, in 2018.

275. It was agreed that the Secretariat should also continue to promote the UNCITRAL Model Law on Public Procurement (2011) [55] through activities such as those referred to in documents A/CN.9/905 and A/CN.9/908, which were before the Commission at its current session (see chapters X and XIV of the present report).

276. It was also emphasized that the above-mentioned activities should be undertaken taking into account the resources available to the Secretariat.

IX. Endorsement of texts of other organizations: the Uniform Rules for Forfaiting of the International Chamber of Commerce

277. ICC requested the Commission to consider possible endorsement of the ICC Uniform Rules for Forfaiting. The Commission recalled that it had endorsed a number of ICC texts, such as the Incoterms 2010, the Uniform Rules for Demand Guarantees: 2010 Revision, the Uniform Customs and Practices for Documentary Credits, the Incoterms 2000, the International Standby Practices, the Uniform Rules for Contract Bonds and the Uniform Customs and Practices for Documentary Credits.

278. It was noted that the objective of the Uniform Rules for Forfaiting was to facilitate, without recourse, financing of receivables arising from international trade transactions by providing a new set of rules applicable to forfaiting transactions. The Commission further noted that forfaiting transactions were covered by the Assignment Convention and the UNCITRAL Model Law on Secured Transactions, and that the Uniform Rules complemented and were consistent with the provisions of the Convention and the Model Law.

279. Taking note of the usefulness of the Uniform Rules in facilitating international trade, the Commission, at its 1059th meeting, on 14 July 2017, adopted the following decision:

The United Nations Commission on International Trade Law,

Expressing its appreciation to the International Chamber of Commerce for transmitting to it the Chamber's Uniform Rules for Forfaiting, which were approved by the Chamber's Banking Commission in November 2012 and

[54] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 18-21 and annex I.

[55] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 192 and annex I.

adopted by the Chamber's Executive Board in December 2012, with effect from 1 January 2013,

Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by providing a new set of rules applicable to forfaiting transactions,

Noting that the Uniform Rules for Forfaiting constitute a valuable contribution to the facilitation of international receivables financing and thus international trade,

Also noting that the Uniform Rules for Forfaiting complement a number of international trade law instruments, including the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[56] and the UNCITRAL Model Law on Secured Transactions,[57]

Commends the use of the Uniform Rules for Forfaiting, as appropriate, in forfaiting transactions.

X. Technical assistance to law reform

280. The Commission had before it a note by the Secretariat (A/CN.9/905) on technical cooperation and assistance activities undertaken since the last report to the Commission in 2016 (A/CN.9/872). The Commission stressed that technical cooperation and assistance continued to be an important part of the Secretariat's activities aimed at ensuring that the legislative texts developed and adopted by the Commission were enacted or adopted by States and applied and interpreted in a uniform manner so as to promote the basic goal of harmonization of international trade law. Such technical assistance and cooperation activities enabled the Secretariat to provide States with information, including technical information, about the enactment of UNCITRAL texts, as well as with drafting assistance, practical experience of enactment, and information and advice on the interpretation and implementation of texts. The Commission acknowledged that the development of legislative texts was only the first step in the process of trade law harmonization and that technical cooperation and assistance activities were vital to the further use, adoption and interpretation of those legislative texts. The Commission expressed its appreciation for the work undertaken by the Secretariat in that regard.

281. The Commission noted that the continuing ability to respond to requests from States and regional organizations for those activities was dependent upon the availability of funds to meet associated costs. With respect to the UNCITRAL Trust Fund for Symposia, the Commission acknowledged the contribution by the Republic of Korea in support of participation in the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business project (as noted in A/CN.9/905, paras. 18 and 67). The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities continued to be considered very carefully and the number of such activities was

[56] General Assembly resolution 56/81, annex. Also available as United Nations publication, Sales No. E.04.V.14.

[57] United Nations publication, Sales No. E.17.V.1.

limited. Of late, they had mostly been carried out on a cost-share or no-cost basis. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions and other possible partners in the public and private sectors. The Commission also encouraged the Secretariat to seek cooperation and partnership with international organizations, including through regional offices and bilateral assistance providers, in the provision of technical assistance. The Commission appealed to all States, international organizations and other interested entities to facilitate such cooperation and take any other initiative to maximize the use of relevant UNCITRAL standards in law reform.

282. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing number of requests for technical cooperation and assistance activities.

283. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to UNCITRAL Trust Fund for travel assistance to developing countries. The Commission noted that resources had been provided to El Salvador, Honduras and Sri Lanka to attend the forty-ninth session of the Commission and to Armenia, Côte d'Ivoire and Sierra Leone to attend sessions of working groups II, IV and VI.

284. With regard to the dissemination of information on UNCITRAL work and texts, the Commission noted the important role played by the UNCITRAL website (www.uncitral.org) and the UNCITRAL Law Library. The Commission welcomed the Library's inclusion on the UNCITRAL website of a new feature highlighting the role of UNCITRAL in supporting the Sustainable Development Goals. The Commission recalled its request that the Secretariat continue to explore the development of new social media features on the UNCITRAL website as appropriate,[58] noting that the development of such features in accordance with the applicable guidelines had also been welcomed by the General Assembly.[59] In that regard, the Commission noted with approval the continued development of the "What's new at UNCITRAL?" Tumblr microblog[60] and the establishment of an UNCITRAL presence on LinkedIn.[61] Finally, recalling the General Assembly resolutions commending the website's six-language interface,[62] the Commission requested the Secretariat to continue to provide, on the website, UNCITRAL texts, publications, and related information in a timely manner and in the six official languages of the United Nations.

[58] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 247.

[59] General Assembly resolutions 69/115, para. 21, 70/115, para. 21, and 71/135, para. 23.

[60] Available from http://uncitral.tumblr.com.

[61] Available from www.linkedin.com/company/uncitral.

[62] General Assembly resolutions 61/32, para. 17, 62/64, para. 16, 63/120, para. 20, 69/115, para. 21, 70/115, para. 21, and 71/135, para. 23.

XI. UNCITRAL regional presence

A. Regional Centre for Asia and the Pacific

285. The Commission had before it a note by the Secretariat on the activities undertaken by its Regional Centre for Asia and the Pacific (A/CN.9/910) and a note by the Secretariat on technical cooperation and assistance (A/CN.9/905, part II) that incorporated the activities undertaken in the region covered by the Regional Centre, and heard an oral report by the Head of the Regional Centre.

286. The Commission acknowledged the noticeable progress, made as a result of the regional activities of the Secretariat through the Regional Centre, in terms of awareness, adoption and implementation of UNCITRAL texts in Asia and the Pacific.

287. Strong support was expressed for the various activities undertaken by the Secretariat and the Regional Centre, which were aimed at:

(a) Providing capacity-building and technical assistance services to States in Asia and the Pacific, including to international and regional organizations and development banks. The Commission emphasized that key goal and how such efforts were also positively impacting the regional contributions to the work of UNCITRAL;

(b) Supporting public, private and civil society initiatives to enhance international trade and development by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL;

(c) Building and participating in regional international trade law partnerships and alliances, including with other appropriate United Nations funds, programmes and specialized agencies, and furthering the establishment of such partnerships. The Commission noted with appreciation the participation, as a non-resident agency, in the efforts of the United Nations to deliver as one in the Lao People's Democratic Republic-United Nations Partnership Framework 2017-2021, in the United Nations Development Assistance Framework (UNDAF) Papua New Guinea 2018-2022 and in the United Nations Pacific Strategy 2018-2022. The Commission also welcomed the agreement on collaboration with the Asian Development Bank aimed at reforming arbitration laws in the South Pacific, focusing on assistance towards accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958[63] (New York Convention);

(d) Strengthening information, knowledge and statistics through briefings, workshops, seminars, publications, social media and information and communications technologies, including in regional languages;

(e) Functioning as a channel of communication between States in the region and the Secretariat. The Commission reiterated the suggestion, made at its forty-seventh session,[64] that States designate focal points in charge of coordinating with the Regional Centre, on non-legislative regional activities of the Secretariat. The

[63] United Nations, *Treaty Series*, vol. 330, No. 4739.

[64] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 212.

Commission further recommended the Secretariat to continue enhancing its communication with States in the region.

288. The Commission requested the Secretariat to actively engage in fundraising activities in order for the Regional Centre to carry out its activities and urged Member States in the region to provide voluntary contributions to the project.

289. The Commission was informed that the Secretariat had completed the necessary arrangements for the extension of the support given by the Government of the Republic of Korea for the operation of the Regional Centre, covering an additional five-year period, from 2017 to 2021, including the necessary amendments to the Memorandum of Understanding signed on 18 November 2011 between the United Nations and the Ministry of Justice and the Incheon Metropolitan City of the Republic of Korea. The Government of the Republic of Korea extended its offer for an annual financial contribution of $450,000 to the UNCITRAL Trust Fund for Symposia, in addition to the office premises, equipment and furniture which it had already provided. The Republic of Korea also extended its offer to provide the non-reimbursable loan of a legal expert to engage in technical cooperation and assistance activities for the coming years. The Commission expressed its gratitude to the Government of the Republic of Korea for the generous gesture to extend its contribution, making possible the continued operation of the Regional Centre.

290. The Commission noted with appreciation the extension by the Government of Hong Kong, China, of the arrangement to contribute a non-reimbursable loan of a legal expert to the Regional Centre to engage in technical cooperation and assistance activities for a second year. The Commission expressed its gratitude to the Government of China for its support to the operations of the Regional Centre.

B. Proposals for the establishment of other regional centres

291. The Commission heard a statement by Cameroon recalling the commitment of the country, through the Chair of the forty-ninth session of the Commission, to seeking to develop the interest of African States in UNCITRAL and to enhancing their participation in its activities. In that context, the Commission welcomed the announcement by Cameroon that it was in the process of accession to and ratification of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[65] (United Nations Sales Convention), the Rotterdam Rules, the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005),[66] and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)[67] (Mauritius Convention on Transparency). The Commission also noted with appreciation that the fiftieth anniversary of UNCITRAL had been celebrated in a well-attended event in Cameroon, entitled "UNCITRAL at 50 and arbitration in Africa".

292. The Commission was advised that Cameroon proposed to host an UNCITRAL regional centre for Africa, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs of the

[65] United Nations, *Treaty Series*, vol. 1489, No. 25567.
[66] General Assembly resolution 60/21, annex.
[67] General Assembly resolution 69/116, annex.

Secretariat. The objectives of the regional centre would be to contribute to the interest of relevant stakeholders in the region in the work of the Commission and to promote the adoption, use and understanding of UNCITRAL texts in Africa.

293. The Commission expressed its gratitude to the Government of Cameroon for its proposal. The Commission noted that the specific offer received from the Government of Cameroon was for a pilot project under which its ministries of justice, trade, finance and foreign affairs had pledged to contribute to the establishment and operation of an UNCITRAL regional centre for Africa that would rely entirely on extrabudgetary resources and would be inspired by the model followed for the establishment of the UNCITRAL Regional Centre for Asia and the Pacific. The Commission approved the establishment of the UNCITRAL Regional Centre for Africa in Cameroon, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs. The Secretariat was requested to take the necessary steps for the establishment of the UNCITRAL Regional Centre for Africa and to keep the Commission informed of developments, including its funding and budget situations.

294. The Commission's attention was also drawn to its statements at previous sessions about the importance of a regional presence for raising awareness of the work of UNCITRAL and, particularly, for promoting the adoption and uniform interpretation of UNCITRAL texts. In view of the successful activities of the Regional Centre for Asia and the Pacific, further efforts should be made to establish an UNCITRAL presence in other regions.

295. The Bahrain Chamber for Dispute Resolution advised that the Government of Bahrain was actively pursuing the establishment, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs, of an UNCITRAL regional centre for the Middle East and North Africa in that State to increase familiarity with UNCITRAL texts and their level of adoption and use in the region. The objectives of the proposed regional centre would be to provide technical assistance to States on the adoption, use and understanding of UNCITRAL texts, to coordinate with international and regional organizations on trade law reform projects in the region, to coordinate communication between States in the region and UNCITRAL and its secretariat, and to build and participate in appropriate regional partnerships and alliances, including with other United Nations bodies.

296. The Commission expressed its gratitude to the Government of Bahrain for its proposal. The Commission noted that the specific offer received from the Government of Bahrain was for a pilot project under which the Bahrain Chamber for Dispute Resolution, in cooperation with other government authorities, had pledged to contribute to the establishment and operation of an UNCITRAL regional centre for the Middle East and North Africa that would rely entirely on extrabudgetary resources and would be inspired by the model followed for the establishment of the UNCITRAL Regional Centre for Asia and the Pacific. The Commission approved the establishment of the UNCITRAL Regional Centre for Middle East and North Africa in Bahrain, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs. The Secretariat was requested to take the necessary steps for the establishment of the UNCITRAL Regional Centre for the Middle East and North Africa and to keep the Commission informed of developments, including its funding and budget situations.

XII. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

297. The Commission considered document A/CN.9/906, on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts, which provided current information on the system for collecting and disseminating information on court decisions and arbitral awards relating to UNCITRAL texts (CLOUT) and the digests of case law.

298. As in previous sessions, the Commission commended the Secretariat for its work on CLOUT and noted with appreciation the increasing number of UNCITRAL legislative texts that were available in the system. As at the date of document A/CN.9/906, 179 issues of compiled case-law abstracts had been prepared, dealing with 1,661 cases. At the date of the oral report to the Commission, that number had arisen to 180 issues for a total of 1,771 cases. The cases related to the following texts:

- New York Convention
- Convention on the Limitation Period in the International Sale of Goods (New York, 1974)[68] and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol of 11 April 1980 (Vienna)[69]
- United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)[70]
- United Nations Sales Convention
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[71]
- Electronic Communications Convention
- UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006[72]
- UNCITRAL Model Law on International Credit Transfers (1992)[73]
- UNCITRAL Model Law on Electronic Commerce (1996)[74]
- UNCITRAL Model Law on Cross-Border Insolvency (1997)[75]
- UNCITRAL Model Law on Electronic Signatures (2001)[76]

299. The Commission took note that there were no meaningful changes in respect of figures provided at its forty-ninth session, in 2016, as to the jurisdictions contributing abstracts to CLOUT. The Commission also took note that the majority of the abstracts

[68] United Nations, *Treaty Series*, vol. 1511, No. 26119.
[69] Ibid., vol. 1511, No. 26121.
[70] Ibid., vol. 1695, No. 29215.
[71] Ibid., vol. 2169, No. 38030, p. 163.
[72] United Nations publication, Sales No. E.08.V.4.
[73] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.
[74] General Assembly resolution 51/162, annex.
[75] General Assembly resolution 52/158, annex.
[76] General Assembly resolution 56/80, annex.

published referred to countries in the Group of Western European and other States. With regard to the legislative texts available in the system, the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration were still the most reported, although there had been a modest but continuous increase of cases concerning the UNCITRAL Model Law on Cross-Border Insolvency and the New York Convention.

300. The Commission was informed that the Secretariat had coordinated a new round of appointments of national correspondents for the period 2017-2022. The Commission further noted that in the period reviewed in document A/CN.9/906, national correspondents had provided approximately 53 per cent of the abstracts published in CLOUT. Although the contribution from the national correspondents was large, it was observed that the materials had mainly been prepared by a small number of correspondents, while the majority had been unable to contribute for the entire duration of their mandate.

301. The Commission expressed its appreciation for the publication of the updated digest of case law relating to the United Nations Sales Convention on the UNCITRAL website in English and Arabic. The Commission acknowledged that translation of the digest into the other official languages of the United Nations was ongoing.

302. The Commission noted with satisfaction the performance of the website www.newyorkconvention1958.org, the continuous efforts to improve its content and accessibility on all electronic supports, and the successful coordination between that website and CLOUT.

303. The Commission was informed that, in order for CLOUT to remain consistent with its original purpose, reach higher volumes of users and provide those users with extensive information on the interpretation of UNCITRAL texts, a further strengthening or reorganization of the system should be explored. In that regard, it was noted that CLOUT was established at a time in which the desired information on the interpretation of UNCITRAL texts was available to a limited extent. At the same time, a wealth of well-established commercial and non-commercial legal resources had been developed, both online and on paper, on domestic and international case law, including case law that applied UNCITRAL texts, which had greatly facilitated access to legal information worldwide. It would thus be timely for the Commission to consider the most appropriate way forward for the system. In that respect, while reaffirming the Secretariat's mandate to coordinate CLOUT and the preparation of digests, the Commission noted that the Secretariat, after consulting with CLOUT national correspondents, might provide more detailed information on possible ways to approach that matter for the Commission's consideration at its future sessions.

304. The Commission also heard an oral report of the meeting of national correspondents. The Commission was informed that the Secretariat had given a presentation of document A/CN.9/906, which had provided the opportunity to brief the newly appointed national correspondents on the structure and functioning of the CLOUT system and on their responsibilities as national correspondents. Moreover, information had been provided on how the UNCITRAL secretariat promoted the uniform application of UNCITRAL texts, including by collaborating with Unidroit and the Hague Conference on Private International Law. Ways to further improve the performance of the CLOUT system in order to reach an increasingly higher volume of users had also been discussed at the meeting. It was noted that those exchanges of

views would further continue in order to involve those correspondents who could not attend the meeting, and would inform the Secretariat's notes on the subject for consideration at future Commission sessions.

XIII. Status and promotion of UNCITRAL legal texts

A. General discussion

305. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention on the basis of a note by the Secretariat (A/CN.9/909). The Commission noted with appreciation the information on treaty actions and legislative enactments received since its forty-ninth session.

306. The Commission also noted the following actions and legislative enactments made known to the Secretariat subsequent to the submission of the Secretariat's note:

(a) Mauritius Convention on Transparency — signature by Cameroon (3 States parties);

(b) United Nations Sales Convention — accession by Fiji (86 States parties);

(c) Electronic Communications Convention — accession by Fiji (8 States parties).

307. The Commission expressed appreciation to the General Assembly for the support it provided to UNCITRAL in its activities and in particular in its distinct role in furthering the dissemination of international commercial law. In particular, the Commission referred to the long-established practice of the General Assembly, upon acting on UNCITRAL texts, to recommend to States to give favourable consideration to UNCITRAL texts and to request the Secretary-General to publish UNCITRAL texts, including electronically, in the six official languages of the United Nations, and take other measures to disseminate UNCITRAL texts as broadly as possible to Governments and all other relevant stakeholders.

B. Functioning of the transparency repository

308. The Commission recalled that, under article 8 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[77] (Transparency Rules), the repository of published information under the Transparency Rules (transparency repository) was to be established.

309. The Commission further recalled that, at its forty-sixth session, in 2013, it had expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of the transparency repository.[78] It had been said that the United Nations, as a neutral and universal body, and its Secretariat, as an independent organ under the Charter of the United Nations, should be expected to undertake the core functions of

[77] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.

[78] Ibid., para. 80.

a transparency repository as a public administration directly responsible for the servicing and proper operation of its own legal standards.[79]

310. The Commission also recalled that, at its forty-seventh session, in 2014, the Secretariat had reported on steps taken in respect of the transparency repository function to be performed.[80]

311. The Commission further recalled that, at its forty-eighth session, in 2015, it had reiterated its strong and unanimous opinion that the secretariat of the Commission should fulfil the role of the transparency repository and that it should establish and operate the transparency repository initially as a pilot project.[81] It also recalled that the General Assembly, in its resolution 70/115, had requested the Secretary-General to establish and operate through the secretariat of the Commission the repository of published information under the Rules on Transparency, in accordance with article 8 of the Rules, initially as a pilot project until the end of 2016, to be funded entirely by voluntary contributions.

312. The Commission noted that the General Assembly, in its resolution 71/135, on the report of the Commission on the work of its forty-ninth session, had requested the Secretary-General to continue with the pilot project until the end of 2017, to be funded entirely by voluntary contributions.

313. The Commission noted with appreciation that the Secretariat had received a grant from the Fund for International Development (OFID) of the Organization of the Petroleum Exporting Countries in the amount of $125,000 and funding by the European Commission in the amount of 160,000 euros, which would allow the secretariat of the Commission to operate the pilot project until the end of 2017.

314. The Commission recalled that a legal officer had been hired in April 2016 to operate the transparency repository. The Commission noted that the Secretariat had received an increased number of inquiries on the Transparency Rules and performed a steadily increasing number of capacity-building activities on the UNCITRAL standards on transparency in treaty-based investor-State arbitration (the UNCITRAL transparency standards). The Commission was further informed that a number of educational activities had taken place and that the UNCITRAL transparency standards were included in several academic programmes, including moots such as the Willem C. Vis International Commercial Arbitration Moot, the Frankfurt Investment Arbitration Moot Court, the Foreign Direct Investment International Arbitration Moot and the IBA-VIAC Mediation and Negotiation Competition. As a result, more than 3,800 students became familiar with the UNCITRAL transparency standards.

315. The Commission was informed about the launch of a new 18-month project under the overall project "Open regional fund — legal reform", conducted by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), upon appointment by the Federal Ministry for Economic Cooperation and Development of Germany (BMZ). Among the main aims of the project was the promotion of the UNCITRAL transparency standards in South-Eastern Europe.

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[79] Ibid., para. 79.

[80] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 108.

[81] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 161.

316. The Commission noted that, overall, and partly as a result of the promotional activities, the trend in investor-State dispute settlement was moving towards transparency. The Commission also noted that, after ratification by Mauritius, Canada and Switzerland (listed in chronological order of ratification), the Mauritius Convention on Transparency would enter into force on 18 October 2017. None of the ratifying States had made reservations and, as a result, the Transparency Rules were now part of the investor-State dispute settlement regime created by investment treaties concluded by those three States. Thus, the Transparency Rules would apply on a unilateral basis, under all treaties concluded by those States, if the claimant agreed to their application (i.e., 35 treaties for Canada, 28 treaties for Mauritius and 114 treaties for Switzerland). The Commission also noted that 16 other States had signed the Mauritius Convention on Transparency.

317. The Commission was informed that the UNCTAD International Investment Agreement Navigator database contained 60 treaties that had been concluded after 1 April 2014. Of those treaties, 46 offered investors the possibility of initiating arbitration according to the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)[82] and thereby incorporating the Transparency Rules. In addition, about 50 per cent of those treaties established elements of transparency for arbitral proceedings not conducted under the UNCITRAL Arbitration Rules. Only 14 treaties excluded the application of the Transparency Rules, half of which foresaw some elements of transparency, either the publication of documents, access to hearings or the possibility of third parties submitting submissions, inspired by the Transparency Rules.

318. With respect to the budget situation of the transparency repository, the Commission was informed about the financial commitment of the European Commission to continue supporting the operation of the transparency repository until 2020, through the provision of an additional 300,000 euros. The grant agreement had been signed on 13 December 2016. The Commission expressed its appreciation to the European Commission for its renewed commitment to providing funding that would allow the Secretariat to continue operating the transparency repository.

319. The Commission was informed that the Secretariat was currently in contact with OFID regarding the obtaining of renewed funding. More generally, the Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the funding of the transparency repository, preferably in the form of multi-year contributions, so as to facilitate its continued operation.

320. The Commission was informed that, with the recent provision of funds from the European Commission, and taking into account the pending decision by OFID to continue funding, as well as possible new commitments, the secretariat would be able to continue operating the transparency repository until the end of 2020.

321. After discussion, the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should fulfil the role of the transparency repository and that it should continue to operate the transparency repository. Accordingly, the Commission recommended to the General Assembly that it request the secretariat of the Commission to continue operating the repository of published

[82] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex II.

information in accordance with article 8 of the Transparency Rules, as a pilot project until the end of 2020, to be funded entirely by voluntary contributions. The Commission also requested that the Commission and the General Assembly be informed of developments regarding the funding and budgetary situation of the transparency repository, based on its pilot operation.

C. International commercial arbitration moot competitions

1. Willem C. Vis International Commercial Arbitration Moot

322. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Twenty-fourth Moot, the oral arguments phase of which had taken place in Vienna from 7 to 13 April 2017. It was also noted that the best team in oral arguments had been the University of Ottawa (Canada). As in previous years, the Moot had been co-sponsored by the Commission. Legal issues addressed by the teams in the Twenty-fourth Moot were based on the United Nations Sales Convention.

323. The representative of the Vis Moot recalled the historical background of the Vis Moot and mentioned that it was one of the remarkable educational events in the area of international trade law. The significant contribution of Michael L. Sher to the Vis Moot was reiterated, and it was recalled that the idea of the Moot had emanated from the UNCITRAL twenty-fifth anniversary Congress. An update on the competition was provided: 338 teams from 76 countries had participated in the 2017 Vis Moot, comprising some 2,000 students, 1,000 arbitrators and 700 coaches. Reiterating the role of the Vis Moot in fostering international trade law and promoting standards in international arbitration, it was stressed that the Vis Moot had also contributed to increasing cultural diversity and improving the gender balance in international arbitration.

324. It was mentioned that an improved gender balance had been demonstrated by the increased participation of female students in recent Vis moots. It was further mentioned that the following year would mark the twenty-fifth anniversary of the Vis Moot and that the UNCITRAL Arbitration Rules would be used. The oral arguments phase of the Twenty-fifth Vis Moot would be held in Vienna from 23 to 29 March 2018. Lastly, the representative expressed appreciation to the Commission for its continued support of the Vis Moot.

325. It was also noted that the Vis East Moot Foundation had organized the Fourteenth Willem C. Vis (East) International Commercial Arbitration Moot, which had been co-sponsored by the Commission, the East Asia Branch of CIARB and many law firms based in Hong Kong, China. The final phase had taken place in Hong Kong from 26 March to 2 April 2017. A total of 125 teams from 31 jurisdictions had participated and the best team in oral arguments had been the West Bengal National University of Juridical Sciences (India). The Fifteenth Vis (East) Moot would be held in Hong Kong from 11 to 18 March 2018.

2. Madrid Commercial Arbitration Moot 2017

326. It was noted that Carlos III University of Madrid had organized the Ninth International Commercial Arbitration Competition in Madrid from 3 to 7 April 2017.

which had been co-sponsored by the Commission. Legal issues addressed by the teams had related to an international sale of goods to which the United Nations Sales Convention, the New York Convention and the rules of arbitration of the Madrid Court of Arbitration were applicable. A total of 23 teams from 11 jurisdictions had participated in the Madrid Moot 2017, which had been held in Spanish. The best team in oral arguments was Pontificia Universidad Católica del Perú (Peru). The Tenth Madrid Moot would be held from 16 to 20 April 2018.

3. Mediation and negotiation competition

327. It was noted that the third mediation and negotiation competition organized jointly by IBA and VIAC, with the support of the Commission, would take place in Vienna from 10 to 14 July 2017. Legal issues to be addressed by the teams had been those addressed at the Twenty-fourth Willem C. Vis International Commercial Arbitration Moot (see para. 322 above). A total of 33 teams from 15 jurisdictions had registered to participate.

D. Bibliography of recent writings related to the work of UNCITRAL

328. The Commission recalled that the UNCITRAL Law Library specialized in international commercial law. Its collection featured important titles and online resources in that field in the six official languages of the United Nations. In 2016, library staff had responded to approximately 490 reference requests from more than 45 countries and had hosted researchers from more than 22 countries.

329. Considering the broader impact of UNCITRAL texts, the Commission took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/907) and the influence of UNCITRAL legislative guides, practice guides and contractual texts as described in academic and professional literature. The Commission noted the importance of facilitating a comprehensive approach to the creation of the bibliography and the need to remain informed of activities of non-governmental organizations active in the field of international trade law. In that regard, the Commission recalled and repeated its request that non-governmental organizations invited to the Commission's annual session donate copies of their journals, reports and other publications to the UNCITRAL Law Library for review.[83] The Commission expressed appreciation to all non-governmental organizations that had donated materials. The Commission noted, in particular, the addition to the UNCITRAL Law Library collection of current and forthcoming issues of the journals *Revue camerounaise de l'arbitrage* (APAA) and *Islamic Capitals and Cities* (Organization of Islamic Capitals and Cities), as well as a great number of books, yearbooks and other publications from the Arab Society of Certified Accountants, CEDEP, the Centre for Transnational Law at the University of Cologne (Germany), the International Rail Transport Committee, the China International Economic and Trade Arbitration Commission, the International Institute for Conflict Prevention and Resolution, the Club of Arbitrators of the Milan Chamber of Arbitration, the Council of the Notariats of the European Union, the European Consumer Centres Network, the European Commerce Registers' Forum, the European Law Institute (ELI), EUF, FCI, the International Federation of Consulting Engineers, the Fondation pour le droit

[83] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 264.

continental, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine, the International Law Association, INSOL Europe, INSOL International, ISDA, the International Women's Insolvency and Restructuring Confederation, the Stockholm Chamber of Commerce and the Kuala Lumpur Regional Centre for Arbitration. The Commission also took note of a large monographic donation by the publisher C.H. Beck.

XIV. Coordination and cooperation

A. General

330. The Commission had before it a note by the Secretariat (A/CN.9/908) providing information on the activities of international organizations active in the field of international trade law in which the Secretariat had participated since the last note to the Commission (A/CN.9/875). The Commission expressed appreciation for the Secretariat engaging with a high number of organizations and entities, both within and outside the United Nations system. Among others, the Secretariat had participated in the activities of the following organizations: the Hague Conference on Private International Law, Unidroit, the European Commission, the United Nations Inter-Agency Cluster on Trade and Productive Capacity, the Office of the United Nations High Commissioner for Human Rights, UNODC, OECD, the Economic Commission for Europe, UNCTAD, the World Bank, the International Law Institute and WTO.

331. The Commission took particular note with satisfaction of the coordination activities involving the Hague Conference on Private International Law and Unidroit. It was mentioned that the Secretariat could pursue further cooperation with the Hague Conference with regard to its judgments project (see para. 268 above) so that developments, including the up-to-date draft text, could be shared with the relevant working groups of the Commission. It was said that having such information would greatly assist the work of the working groups in considering how the projects interacted and in ensuring that there was no overlap or duplication of work.

332. The Commission also noted that the coordination work of the Secretariat concerned topics currently being considered by the working groups, as well as topics related to texts already adopted by the Commission, and that the Secretariat had participated in expert groups, working groups and plenary meetings with the purpose of sharing information and expertise and avoiding duplication of work in the resultant work products.

333. The Commission heard an oral report on the preparation of a guidance document in the area of international commercial contract law (with a focus on sales). It was recalled that, over the previous few decades, UNCITRAL, the Hague Conference on Private International Law and Unidroit, as well as a number of other entities, including at the regional level, had drawn up various legislative and non-legislative instruments in the area of international commercial contract law. It was added that, given the number of instruments in place, it would be beneficial to provide guidance in order to identify the relevance and impact of each instrument and their relationship with other legal instruments. In that light, at its forty-ninth session, the Commission had approved the "Joint proposal on cooperation in the area of international

commercial contract law (with a focus on sales)" and had asked the Secretariat to implement the Commission's decision in coordination with the Hague Conference on Private International Law and with Unidroit and to report periodically on the progress of that work.[84]

334. It was indicated that work had started by identifying experts who, in a personal capacity, could assist in preparing a draft text, tentatively in the form of a legal guide, to be circulated for validation to stakeholders and, eventually, to be presented to the Commission. It was explained that the goal of the suggested legal guide was to assist in identifying, understanding and applying uniform instruments. It was added that the legal guide would be aimed at explaining the relationship between different instruments and the fundamental features of each of them, rather than focusing on their details. It was reiterated that the legal guide would have no normative character and would not contain an interpretation of relevant rules, but rather would provide basic information on existing instruments and include illustrations for the benefit of different legal actors, such as judges, arbitrators, legislators and legal counsels. It was also indicated that special attention was being paid to minimizing the budgetary impact of the suggested work.

335. The Commission took note of the progress made on the preparation of a guidance document on international commercial contract law (with a focus on sales) and encouraged the Secretariat to continue its collaboration with the Hague Conference on Private International Law and Unidroit on the project.

336. The Commission also heard an oral report on coordination activities relating to security interests. It was recalled that, at its forty-ninth session, in 2016, it had renewed the mandate of the Secretariat to continue its coordination efforts in the area of security interests and given a mandate to the Secretariat to update the joint publication *UNCITRAL, Hague Conference and Unidroit Texts on Security Interests*[85] and to reflect that decision in its publications programme.[86] The Commission requested the Secretariat to continue those efforts and to update the joint publication in order to include further recently adopted texts on security interests. The Commission asked the Secretariat to reflect that request in its publications programme and to take any other measures to ensure future publication of any final text resulting from that work, including electronically and in the six official languages of the United Nations.

337. The Commission noted with appreciation the efforts of the Secretariat in coordinating and cooperating with a number of other organizations active in the area of security interests. It was noted that the Secretariat had provided comments on the World Bank principles for effective insolvency and creditor/debtor regimes contained in the Insolvency and Creditor Rights Standard and was expecting to receive the comments of the World Bank on a revised draft of the Standard that contained the key recommendations of the Secured Transactions Guide. In addition, it was noted that the Secretariat had met with representatives of the European Commission and had discussed further coordination efforts, including a joint expert group meeting, with a view to ensuring a coordinated approach to the law applicable to the third-party

[84] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 281.

[85] United Nations (New York, 2012).

[86] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 127 and 128.

effects of transactions in receivables and securities. It was further noted that the Secretariat had attended the first meeting of governmental experts on a draft protocol to the Convention on International Interests in Mobile Equipment (Cape Town Convention) on matters specific to agricultural, construction and mining equipment, with a view to ensuring the avoidance of duplication of efforts that could lead to overlap and conflict with the Commission's work on security interests. The Commission also noted with appreciation the Secretariat's coordination efforts with the World Bank Group, the Organization of American States and APEC in providing technical assistance and assistance with respect to local capacity-building in the area of security interests.

338. The Commission observed that coordination work often involved travel to meetings of the different organizations concerned and the use of funds allocated for official travel. The Commission reiterated the importance of such work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

B. Reports of other international organizations

339. The Commission took note of statements made on behalf of the following international and regional organizations.

1. International Institute for the Unification of Private Law

340. The Secretary-General of Unidroit reported on the main activities of Unidroit since the forty-ninth session of UNCITRAL, in 2016. In particular, the Commission was informed about the activities set out below.

(a) Cape Town Convention

341. The Cape Town Convention continued to attract new accessions, with 73 States parties. Similarly, the Aircraft Protocol now had 67 States parties, while the recent ratification of the Protocol to the Cape Town Convention on Matters Specific to Railway Rolling Stock (Rail Protocol) by Gabon, and its signature by France, Sweden and the United Kingdom had put it firmly on the path towards further ratification and entry into force.

342. The Ratification Task Force for the Rail Protocol (in which Unidroit participated in as co-chair of the Rail Preparatory Committee), had met several times in the previous 12 months to monitor progress and identify strategic partners.

343. The committee of governmental experts entrusted with the preparation of a draft protocol to the Cape Town Convention on matters specific to agricultural, construction and mining equipment had held its first meeting from 20 to 24 March 2017. The meeting had been attended by 126 representatives from 48 Governments (30 Unidroit member States and 18 non-member States), six regional and intergovernmental organizations, including an observer from UNCITRAL, and four international non-governmental organizations.

344. The committee had made good progress in reviewing the preliminary draft text provided by the study group. The most debated issues had been: (a) the scope of the protocol in relation to agricultural, construction and mining equipment; (b) how the

protocol should address interests arising out of the association of such equipment with immovable property; and (c) the amendment procedure for the protocol, with particular regard to the Harmonized System codes of the World Customs Organization, contained in the annexes to the preliminary draft protocol.

345. Most of the text proposed by the study group had been adopted by the committee. The committee hoped that it would be able to finalize the draft protocol at its second meeting, scheduled to take place in Rome from 2 to 4 October 2017.

(b) Transnational civil procedure — formulation of regional rules

346. Against the background of the American Law Institute /Unidroit Principles of Transnational Civil Procedure, which had been adopted in 2004, Unidroit continued to work with ELI to adapt those Principles to the specificities of European regional legal cultures, with a view to drafting Europe-specific regional rules.

347. The steering committee and co-reporters of working groups had met in Vienna in November 2016 and in Rome in April 2017. The project had also been presented at the ELI Annual Assembly held in Ferrara, Italy, from 7 to 9 September 2016. Unidroit and ELI had confirmed their estimate of substantial completion of the project by 2018.

(c) Legislative guide on principles and rules capable of enhancing trading in securities in emerging markets

348. The Committee on Emerging Markets Issues, Follow-up and Implementation, established to assist with the promotion and implementation of the 2009 Geneva Convention on Substantive Rules for Intermediated Securities, had held its third meeting in Rome on 12 and 13 December 2016, at which it had reviewed in detail the comments received on the draft legislative guide circulated earlier in 2016. Following the meeting, a videoconference had been held on 16 January 2017 to review the revised draft legislative guide, which had later been circulated again for comment.

349. The Committee had held its fourth meeting in Beijing on 29 and 30 March 2017, at the invitation of the China Securities Regulatory Commission. It had been jointly hosted by the China Securities Depository and Clearing Corporation Ltd.

350. On the first day, an open colloquium had been held on the theme "Enhancing and ensuring legal certainty in both current and future holding systems". On the second day, building upon the discussions during the colloquium, the members and observers of the Committee, as well as other States and organizations, had reviewed in detail the draft legislative guide on intermediated securities. The draft legislative guide, as revised, had been adopted by the Unidroit Governing Council at its ninety-sixth session, held in Rome from 10 to 12 May 2017. The guide was being edited and would be published later in 2017.

(d) Cooperation on international sales law

351. The secretariats of Unidroit, UNCITRAL and the Hague Conference on Private International Law had continued their exploratory work on the preparation of a guidance document on existing texts in the area of international sales law (see also paras. 333 and 334 above).

(e) Cultural property

352. Unidroit had a long-standing history of cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the area of cultural property. The 1995 Convention on Stolen or Illegally Exported Cultural Objects had 40 States parties, following the recent accessions of Bosnia and Herzegovina, the Lao People's Democratic Republic and Tunisia. Cooperation had intensified with UNESCO and the other organizations participating in the task force on the implementation of Security Council resolution 2199.

(f) Private law and agriculture

353. Unidroit was pursuing its cooperation with the Rome-based organizations of the United Nations system for food and agriculture. After the adoption of the Unidroit/ Food and Agriculture Organization of the United Nations (FAO)/ International Fund for Agricultural Development *Legal Guide on Contract Farming*, the three organizations had devised a series of promotional and follow-up activities. In that context, the Unidroit and FAO secretariats were currently preparing a legislative study on contract farming with a view to assisting in the development of a favourable legal framework in that area of importance for food security. Another follow-up activity was the preparation of a legal guide on agricultural land investment contracts, the scope and structure of which had been discussed at the first meeting of the working group, from 3 to 5 May 2017. The first draft chapters would be considered at the next meeting, in late 2017.

2. Organization for Economic Cooperation and Development

354. The OECD representative outlined some of the recent work of the Organization relevant to that of UNCITRAL, particularly relating to arbitration and investment dispute settlement. Issues pertaining to differences between commercial arbitration and investment arbitration, with regard to the role of appointing authorities, and to multiple investment treaty claims against a Government by shareholders of the same company for the same injury, were presented as examples of issues discussed at OECD, which provided important background for investment policymakers considering questions relating to dispute settlement. In addition, the experience of OECD in updating the thousands of existing double tax treaties was mentioned. The conclusion by 68 jurisdictions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting in June 2017, which allowed Governments to update the many existing bilateral tax treaties in a single process, was highlighted, along with its possible relevance for reform of the many investment treaties. In conclusion, the current work of OECD at its investment round tables, in which a wide range of OECD, Group of 20 and other Governments participated, was presented. It was noted that, as an intergovernmental forum that had met every six months since 2011 to discuss investment treaties, the round table had fostered an informative dialogue between Governments, enriched with input from stakeholders and experts. Lastly, it was mentioned that the current agenda of the round table addressed: (a) the balance between investor protection and Governments' right to regulate; (b) the societal benefits and costs of investment treaties; and (c) arbitrators, adjudicators and appointing authorities. The OECD representative reaffirmed the continued interest of OECD in cooperating with UNCITRAL.

3. United Nations Conference on Trade and Development

355. The representative of UNCTAD presented the *World Investment Report 2017: Investment and the Digital Economy*, launched on 7 June 2017. Some of the main foreign direct investment trends at the global and regional levels were presented, as well as the latest trends in international investment policymaking. With respect to the latter it was noted that, in 2016, the number of international investment agreements had continued to grow, as had the number of known treaty-based investor-State dispute settlement cases.

356. It was noted that, since 2010, UNCTAD had focused its work on the reform of international investment agreements to make them more conducive to sustainable development and that many of the new international investment agreements included reform elements that preserved the right to regulate, while maintaining investor protection, and improved investor-State dispute settlement, while fostering responsible investment. It was stated that the *World Investment Report 2017*, in which the need to modernize existing old-generation international investment agreements had been emphasized, contained an analysis of 10 policy options that States could adapt and adopt in line with their specific reform objectives. Among those reform options, engaging multilaterally was particularly underscored. It was stated that multilateral engagement established a common understanding and that it would be the most efficient way to address the inconsistencies, overlaps and development challenges of today's international investment agreement regime. However, it was also stated that such an approach would also be the most challenging avenue for international investment agreement reform.

357. The Mauritius Convention on Transparency, which fostered greater application of the Transparency Rules to international investment agreements concluded prior to 1 April 2014, was mentioned as an example of a possible multilateral approach. It was stated that future international investment agreement reform actions could draw upon the process of multilateral negotiations that had led to the Transparency Rules and the Mauritius Convention on Transparency, and the Convention's opt-in mechanism.

358. At the end of the presentation, some high-level UNCTAD events were highlighted, including the annual international investment agreements conference (to be held in Geneva from 9 to 11 October 2017), at which discussions would be held on how to modernize existing old-generation international investment agreements, and the regional conference on international investment policies (to be held in Baku on 24 and 25 October 2017), at which discussions would be held on the latest developments and key challenges in international investment policies for economies in transition and assistance would be provided to policymakers in devising and reforming international investment policies.

4. Permanent Court of Arbitration

359. The representative of the Court made a statement providing a summary of its work during the period 2016-2017, including an update of the Court's provision of registry support in a number of different international arbitration and conciliation proceedings and its experience with the operation of the UNCITRAL Arbitration Rules, including its role as the appointing authority. Noting the Court's experience in investment arbitration and with tribunals with a permanent or long-term character, and recognizing the numerous reforms being proposed in the area of investment

dispute settlement, the Court's role in assisting its member States in designing and implementing efficient and fair dispute resolution proceedings was underscored. It was further stated that, while the Court took no view on the desirability of particular reforms, it stood ready to support any new approaches to the present system of investment arbitration at the technical level.

C. International governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups

360. The Commission recalled that, at its forty-third session, in 2010, it had adopted the summary of conclusions on the UNCITRAL rules of procedure and methods of work.[87] In paragraph 9 of that summary,[88] the Commission had decided to draw up and update as necessary a list of international organizations and non-governmental organizations with which UNCITRAL had long-standing cooperation and which had been invited to sessions of the Commission. The Commission also recalled that, further to its request to restructure the information about such organizations,[89] the Secretariat had adjusted the online presentation of information concerning intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups and the modality of communicating such information to States, and that the adjustments made had been to the satisfaction of the Commission.[90]

361. The Commission also recalled that, at its forty-eighth session, in 2015, it had requested the Secretariat, when presenting its oral report on the topic of organizations invited to sessions of UNCITRAL, to provide comments on the manner in which invited organizations fulfilled the criteria applied by the Secretariat in making its decision to invite non-governmental organizations.[91] The Commission further recalled that, at its forty-ninth session, in 2016, it had welcomed the detailed and informative report presented by the Secretariat pursuant to that request.[92]

362. The Commission noted that, since its forty-ninth session, the Energy Community had been added to the list of international intergovernmental organizations invited to sessions of UNCITRAL and that the following organizations had been added in the list of international non-governmental organizations invited to sessions of UNCITRAL: Arbitrators' and Mediators' Institute of New Zealand Inc. BAC/BIAC, HKMC, IIDC, RAA, and SIMI. The Commission noted the reasons for the Secretariat's decision to invite those additional international non-governmental organizations to sessions of UNCITRAL and its working groups. It also heard information about non-governmental organizations whose requests to be invited to sessions of UNCITRAL and its working groups had been rejected and reasons for the rejection.

363. The Commission also noted that, pursuant to General Assembly resolutions 68/106 and 69/115 (para. 8 in both resolutions), 70/115 (para. 7) and 71/135 (para. 9),

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87 Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 305.

88 Ibid., annex III.

89 Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 292.

90 Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 178.

91 Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 280.

92 Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 290.

all States and invited organizations were reminded, when they were invited to UNCITRAL sessions, about the rules of procedure and methods of work of UNCITRAL. Such a reminder was effectuated by inclusion in invitations issued to them of a reference to a dedicated page of the UNCITRAL website where the main official documents of UNCITRAL pertaining to its rules of procedure and work methods could be easily accessed.

364. The Commission welcomed the report of the Secretariat on international governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups, but requested the Secretariat to provide the relevant information in writing for future sessions.

XV. Commemoration of the fiftieth anniversary of UNCITRAL

A. Statements congratulating UNCITRAL

365. States from all regions joined in applauding the outstanding contribution of UNCITRAL to a better international legal order. Throughout the session, the Commission heard further messages of congratulation from States and long-standing delegates to UNCITRAL, emphasizing its achievements and contributions to the development of the international law of trade.

366. At the 1068th meeting of the Commission, the Secretariat informed the Commission that a message had been received from the Prime Minister of the Russian Federation on the occasion of the fiftieth session of UNCITRAL. The Secretary of UNCITRAL read out the message to the Commission.

367. It was observed that, in the period to 1966, the focus of the international legal community — including the International Law Commission — had been on public international law. Consequently, there had been no United Nations-led systematic approach to developing substantive legal rules of a private international law character to govern international trade. The proposal of Hungary to the General Assembly at its nineteenth session to establish UNCITRAL had subsequently been welcomed by the General Assembly as an opportunity for considering the challenges in international trade law and trading relations that had arisen as a result of the significant technological and social changes over the previous century.

368. The Commission's attention was drawn to the major achievements of UNCITRAL in issuing conventions, model laws, legislative guides and other texts over its 50 years of existence. States acknowledged the success, in a variety of areas of international trade law, of UNCITRAL texts including the New York Convention, the United Nations Sales Convention, the UNCITRAL Arbitration Rules and the texts on insolvency, secured transactions and electronic commerce. It was recalled that UNCITRAL had issued recommendations to Governments and international organizations concerning the legal value of computer records [93] back in 1985, demonstrating innovative legal thinking at a time when e-commerce was an entirely new, and little understood, topic. That intellectual leadership underpinned the wide acceptance of later UNCITRAL texts on e-commerce and others.

[93] Available from www.uncitral.org/pdf/english/texts/electcom/computerrecords-e.pdf

369. It was noted that the benefits of the highly regarded UNCITRAL texts also accrued in their effective implementation and use in practice, and States enumerated the many UNCITRAL texts that they had enacted domestically.

370. The development potential of UNCITRAL texts was noted to be reflected in many of the Sustainable Development Goals. Predictable, stable and balanced legal frameworks, such as those promoted by UNCITRAL, enabled and increased trust between trading partners, which in turn allowed the potential benefits of international trade to be realized. In other words, people prospered because those benefits allowed trading partners to minimize their legal risks and to resolve disputes in a fair, efficient and speedy manner.

371. In addition, it was underscored that the benefits of such an international legal order extended beyond those well-understood economic benefits to improved peace and security — themselves key elements of the United Nations agenda. Peace and security required a solid legal grounding and a common understanding of the principles of law in a variety of fields, so that States were enabled to support a business environment and cooperation and thus to foster development.

372. It was also observed that an increasingly economically interdependent world required not just a harmonized but also a modernized legal framework for the facilitation of international trade and investment. Here, too, the sustainability of developments from social, environmental and economic perspectives were crucial for meeting today's challenges, and the demonstrated willingness of UNCITRAL to balance human and economic needs was welcomed in that regard. It was added that UNCITRAL had proved itself adept at meeting past and present challenges, also in cooperation with other international and regional organizations active in international trade law reform.

373. In that connection, it was observed that the fiftieth anniversary offered an opportunity to look to the future. Many delegates and observers appreciated that ideas for possible future work were considered during the Commission session.

374. The contributions of all participants in the UNCITRAL law-making process were recognized. The achievements of the eight secretaries of UNCITRAL to date were acknowledged. It was noted that the efforts of the Secretariat in supporting the Commission and its working groups, the devotion of considerable resources by States and the expertise of international observer organizations had all played a considerable part in ensuring the success of UNCITRAL. That success, it was emphasized, was founded on the practical value of UNCITRAL texts, the development process of which had ensured the provision of commercially realistic texts that could and would function well in domestic use. It was also emphasized that the limited resources of UNCITRAL also indicated a need for cooperation with other rule-formulating agencies and development institutions.

375. In addition, it was recalled that UNCITRAL had been established to provide countries at all levels of development with a voice in the development of its legal texts. States, including developing countries, were pleased to observe that they had been able to provide officers of the Commission and its working groups, and had benefited not only from being able to contribute to legislative development, but also from enacting and using the resulting texts. Further benefits had been provided to an entire generation of lawyers in terms of training, experience and practical implementation of rules in the field of international trade law. UNCITRAL was urged

to continue its efforts to facilitate the participation of all member States in its meetings, so as to ensure the continued worldwide acceptance of its texts.

B. Mini-conference organized by Hungary

376. The Commission heard that, on 3 July 2017, Hungary had held a mini-conference at the Vienna International Centre to celebrate the fiftieth annual session of UNCITRAL. The Commission recalled that the Government of Hungary made the proposal to the nineteenth session of the General Assembly that had resulted in the establishment of UNCITRAL by means of resolution 2205 (XXI). Hungary had proposed the inclusion of an item on the agenda of that session entitled "Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade".

377. At the mini-conference, the relationship between UNCITRAL and Hungary, pitfalls and challenges in the international unification of private law and the United Nations Sales Convention as a source of inspiration for the new Hungarian contractual liability were discussed.

378. The Commission expressed its appreciation for the mini-conference.

C. UNCITRAL Congress 2017

379. The Commission recalled its instruction to the Secretariat to organize a Congress to commemorate its fiftieth anniversary,[94] and heard that the Congress had taken place from 4 to 6 July 2017. The Commission was informed that the programme and other materials for the Congress were available on the UNCITRAL website.

380. At the Congress, which had been entitled "Modernizing International Trade Law to Support Innovation and Sustainable Development", the question of how trade law reform based on the modern, fair and harmonized rules of UNCITRAL could contribute to the 2030 Agenda for Sustainable Development had been examined. In that regard, the Commission's attention was drawn to the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,[95] in which States had endorsed the efforts and initiatives of UNCITRAL, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities by international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in that field.

381. The Commission heard that the Congress had provided an opportunity for the first in-depth look into the past and future of UNCITRAL since 2007. It was reported that the event had succeeded in bringing together delegates and experts who had worked with UNCITRAL for decades and new and young participants with an interest in the work of UNCITRAL.

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[94] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 366.

[95] General Assembly resolution 69/313, annex.

382. It was noted that one of the aims of the Congress had been to raise awareness of issues that the Commission might wish to take into account in considering its work programme at a future time, including topics for possible future research, how UNCITRAL developed and updated legislative texts and how to encourage the effective use and implementation of such texts. Some participants submitted policy and proposed research papers and had been able, through brief presentations, to encourage other participants to read those papers and consider the issues raised. The quality of the interventions from speakers, moderators and other participants had been recognized as excellent.

383. The Congress had also elicited innovative ideas for modernizing international trade law in a sustainable manner. It was observed that the articulation of ideas for the future was precisely what such a Congress should achieve — in other words, the Congress had been much more than a celebratory event.

384. The Legal Counsel had opened the Congress by emphasizing the importance of international cooperation and trade to the United Nations agenda, particularly the 2030 Agenda for Sustainable Development. In addition to congratulating UNCITRAL on its achievements, he had acknowledged the transparent, inclusive and multilingual manner in which its texts were developed, and had welcomed the opportunity it provided for developing countries to have a voice in that process. The comment echoed the overarching goal of the 2030 Agenda to "leave no one behind".

385. The Minister of Justice of Austria, the country that had hosted UNCITRAL for nearly 40 years, had congratulated UNCITRAL on its fiftieth anniversary and recalled the proposal of Hungary that had led to the establishment of the Commission, in 1966. He recognized that UNCITRAL had met the need for progressive development of private international law in international trade, had allowed the enormous technological and social changes over recent decades to be accommodated in the resulting legal frameworks and had taken the lead through dialogue to bring many divergent views together. He had welcomed the emphasis on modernization of those frameworks and on sustainability, which remained a necessity in the current times of enormous environmental, economic and social challenges.

386. During the first session of the Congress, distinguished speakers from a variety of regions and organizations[96] had presented international, regional and national perspectives on the achievements of UNCITRAL and its potential contributions to sustainable development (including economic growth, development and institution-building). The speakers had voiced ongoing commitment to UNCITRAL, described as one of the most influential organs in legal harmonization, and had encouraged nations to join together to support its work, described as a "masterpiece of global hope and security". Points raised included the importance of reducing barriers to access to international commercial markets and of enhancing trade and economic growth, and so improving peoples' well-being in all countries, and in developing countries in particular. In addition, the Commission's major and positive effect on the rule of law and in improving international trade and cooperation, the importance of recognizing the anti-globalization movement and the pernicious effect of corruption on international trade had been emphasized.

[96] Details on the speakers and sessions may be found in the Congress programme, available on the UNCITRAL website.

387. The benefits of cooperation and coordination and the positive contributions of UNCITRAL to a collaborative approach had also been highlighted. Examples included the Commission's work on anti-corruption with UNODC (custodian of the United Nations Convention against Corruption) and the support given to other international bodies such as the World Bank in its reform activities in insolvency and secured transactions and to EBRD in its legal transition work, in which UNCITRAL texts had served as models for national legislative reform.

388. Key emerging themes had included the "convening power of UNCITRAL", a phrase repeated throughout the Congress. The phrase reflected that UNCITRAL provided a learning space in which people could gain an understanding of the questions to be addressed and of the experience of others, so as to develop the law of international trade in a way that would be fit for purpose.

389. In a keynote speech opening the afternoon sessions on 4 July, the benefits to one system from the use of UNCITRAL texts had been outlined, demonstrating the importance of creativity in law-making, the benefits and challenges of increased human interaction in cross-border commerce and the importance of the rule of law in supporting that commerce. International cooperation and coordination, once again, had been identified as key drivers of success.

390. During the first panel of the Congress, the qualitative and quantitative benefits in the use of model laws, including empirical research demonstrating a large and positive impact of UNCITRAL texts on dispute settlement, the challenges raised in the interpretation of model law-based provisions and success factors for model laws, and the need for, and impact and functions of, model laws at the regional level, had been considered.

391. A second panel had addressed the process of UNCITRAL law-making in corporate insolvency, transport of goods by sea and secured transactions, and the benefits of the participation of both delegates from States and experts in legislative development. The challenges of achieving broad and consistent representations in UNCITRAL work had also been noted.

392. A subsequent panel had considered the relationship between multilateral and regional organizations, and whether their work reinforced each other's or created tension. The similarities between law reform at the multilateral and regional levels had been noted, and it had been observed that transferability of solutions between systems should be assumed — and, indeed, that attempts to impose one region's or system's solution might be counterproductive. The benefits of an empirically based approach had been highlighted, and the power of UNCITRAL to convene participants had again been recognized as key. Ongoing challenges relating to disengagement in some regions and retaining consistent expert presence in some working groups had been noted, and UNCITRAL had been urged to engage in interactive regional engagement in response.

393. Opportunities and challenges in the use of UNCITRAL models had also been discussed. While the success of UNCITRAL in bridging impasses and finding middle ground had been noted, so had the challenges that nonetheless remained. Examples included unexpected interpretations of texts and the use of options and guidance rather than legislative text and variations in enactment, which had all led to divergence in practice. On the other hand, the role of UNCITRAL in promoting consistency in terminology as an aid to understanding had been a positive step.

although linguistic issues would remain considerable. The growing interaction between investment law and foreign direct investment also brought into play the need to balance the interests of the private and public sectors and the importance of stable legal frameworks.

394. The first day had concluded with a moderated exchange of views by former secretaries and Chairs of UNCITRAL and the Commission's current Secretary. They had discussed the comparative advantage of UNCITRAL in law reform in terms of its multilingualism and inclusiveness and had agreed that, despite the Commission's limited resources, pursuing cooperative approaches would remain critical. It had been added that the influence of UNCITRAL could not always be measured and that success criteria went far beyond the domestic enactment of UNCITRAL texts. Indeed, it had been considered that even failures could be instructive and lead to new and creative solutions. It had been further agreed that there was no perfect system of working groups and that the Commission's willingness to adapt its structure to meet the challenges it faced was another factor underpinning its achievements.

395. The second day had started with a session on the topic "Developments in the law of international trade and commerce: integrated systems to support cross-border trade". Stressing the importance of existing UNCITRAL texts on electronic commerce, several suggestions had been made to build upon that solid platform.

396. The day's first panel had been devoted to legal issues arising from digital contracts and digital property. Reference had been made to smart goods, whose software component, including periodic access to updates, was essential for proper use. Another example cited was that of electronic enforcement, which could significantly impact upon remedies for non-performance. It had been noted that the legal aspects of those emerging issues was yet to be fully explored. Another set of questions related to the relationship between the notion of ownership, itself subject to different definitions, and control over data, including for privacy and data protection purposes.

397. During the second panel, various aspects of the use of distributed ledgers based on blockchain technology (DLT), including cryptocurrencies and smart contracts, had been discussed. It had been indicated that several of those aspects could be addressed in existing legislative texts inspired by the principle of technological neutrality, and a "fitness check" of UNCITRAL texts might indicate that they were better able to accommodate modern tools than was in fact appreciated. However, matters related to the delocalized nature of certain distributed ledgers could pose additional challenges to legal notions based on geographical location. It had been added that ongoing efforts aimed at dealing with legal and regulatory issues pertaining to distributed ledgers would benefit from closer coordination and that UNCITRAL could be in a position to do so effectively. It had been concluded that UNCITRAL should monitor developments in the field.

398. The third panel had dealt with transport, trade facilitation and payments. With respect to payments, it had been indicated that business practices had changed significantly since the adoption of the UNCITRAL Model Law on International Credit Transfers (1992)[97] and that the preparation of a new legislative text could bring

[97] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.

significant benefits, for instance with respect to supporting regulatory mechanisms, promoting financial inclusion and stability and implementing monetary policies more effectively. Examples of issues to be considered included: liability allocation, including for fraud and error; authentication of parties and security of transfers; finality of settlements; and recognition of multilateral clearing.

399. With respect to trade facilitation, reference had been made to the importance of UNCITRAL texts, namely the Electronic Communications Convention and the Model Law on Electronic Transferable Records, in implementing provisions on electronic commerce and paperless trade facilitation contained in free trade agreements. In particular, it had been indicated that the possibility of dematerializing bills of lading and similar commercial documents could greatly support interoperability for business-to-business and business-to-Government electronic exchanges at the national and international levels.

400. It had also been suggested that UNCITRAL could consider preparing a uniform legal regime for logistics contracts, which were distinct from traditional carriage of goods or warehousing contracts, and some aspects of which were already successfully dealt with in the Rotterdam Rules. It had further been noted that, while most existing legislative provisions on electronic commerce were transactions-oriented, the platform model was currently prevalent in the digital economy. Accordingly, it had been suggested that UNCITRAL should consider preparing dedicated legislative provisions for electronic platforms, dealing with issues such as the relationship between platform operators and users, including allocation of liability, and decentralized reputational systems.

401. Applying modern technologies to the question of the credit economy, it had been considered at the Congress how DLT might affect many aspects of secured transactions, including the substantive rules, the infrastructure and the practices. One issue that had been raised was whether the rules of the UNCITRAL Model Law on Secured Transactions that applied to equity securities should also apply to cryptocurrencies and tokens that were similar to equity securities. DLT might minimize a number of risks, such as that of unauthorized registrations, for which the Model Law provided comprehensive and complex rules. DLT also had the potential to facilitate the indexing of registrations against unique identifiers of grantors that might be allocated by and maintained in DLT systems, reducing the risk that registrations would be found seriously misleading. From the practical standpoint, DLT applications had the potential to facilitate the monitoring of encumbered assets, preventing their misuse and connecting those assets with other applications that facilitated their disposal (e.g., supply chain systems). Enforcement of security rights could also be streamlined while preserving the balance between the rights of secured creditors, grantor and third parties affected by enforcement. Finally, DLT introduced a number of new questions in relation to the intersection of secured transactions and prudential regulation, including whether cryptocurrencies and equity-like tokens would qualify as eligible collateral allowing banks to reduce capital charges.

402. Enhancing coordination between secured transactions law and prudential regulation had been noted as an essential element for fostering access to credit in a safe and sound financial environment. In particular, the panel had highlighted that a lack of coordination between those two branches of the law undermined the effectiveness of secured transactions law reforms in broadening financial inclusion and might raise financial stability concerns. In fact, while the UNCITRAL Model Law

on Secured Transactions facilitated the use of any movable assets as collateral, capital requirements were sceptical of the ability of non-financial assets to effectively reduce risk. Hence, asset-based lending tended to develop outside regulated banking activities. It had been suggested UNCITRAL should promote a dialogue and inter-institutional cooperation with the Basel Committee on Banking Supervision and other relevant organizations, so as to develop guidance on compatible use of their tools. The overarching aim should be to facilitate the extension of secured credit, including through domestic banking systems, in order to reduce the cost of borrowing and promote financial stability.

[68]. The subsequent sessions on insolvency law had commenced with a short panel discussion on the work undertaken by UNCITRAL on insolvency law to date, including the lessons learned not only from the range of harmonization techniques used in the texts completed by Working Group V (e.g., model law, legislative guide and practice guide), but also from the degree of complexity of the topics pursued and their relevance to the different participants in the process.

[68]. A second panel had introduced proposals on the following: a model law approach to resolving sovereign insolvency; the need to incorporate, in insolvency regimes for micro, small and medium-sized enterprises, provisions on both corporate and personal insolvency; a global recognition regime for the resolution of financial institutions; and addressing various issues arising from the intersection of insolvency proceedings and arbitration.

[68]. A third panel had extended the discussion to include the following: the development of a framework for asset tracing and recovery; the unification of private international law rules to resolve conflict and achieve consistency in cross-border insolvency judgments; the possibility of developing a convention on various aspects of cross-border insolvency; an approach to resolving sovereign insolvency involving the use of arbitration and conciliation; an approach to resolving transnational corporate collapse through recognition of the right of corporations (at their inception) to select and register the insolvency law that would apply to resolve future financial difficulty; and formulation of choice-of-law rules to facilitate certainty and avoid conflict in cross-border bank insolvencies. The participants had concluded that there remained much work to be done in the field, and had once again highlighted the importance of cooperation in achieving successful outcomes.

[68]. The third day of the Congress had started with consideration of the topic of dispute settlement. The first panel had been a round-table discussion on possible reforms of the investor-State dispute settlement regime, and had prompted three topics for discussion: issues related to the current investor-State dispute settlement regime; adjustments and improvements to that regime; and, finally, the possible creation of a multilateral investment court. The panel had debated various recently developed solutions to the issues identified. The adoption of the Transparency Rules by an increasing number of stakeholders, as well as the forthcoming entry into force of the Mauritius Convention on Transparency, had also been mentioned as positive developments.

[68]. The second panel had focused mainly on commercial arbitration, and had considered three main issues: whether there was a need for further regulation or whether the time had come for deregulation; issues faced when regulating in a multilateral context, such as the inherent tensions in any harmonization project; and

how UNCITRAL had sought to strike a balance through its working methods and the different types of instruments it has developed; and the spillover from investor-State arbitration into commercial arbitration. Topics of interest for possible work mentioned during the panel discussion had included the question of combining arbitration and conciliation, parallel proceedings and adjudication.

408. The third panel, on new frontiers in dispute settlement, had covered developments in the field of online dispute resolution and solutions of a technological nature to enhance access to justice. A proposal on developing bilateral treaties on commercial arbitration had also been introduced.

409. During the afternoon of the third day, the use, implementation and effective understanding of UNCITRAL texts in practice had been addressed. The first panel had considered the tools that UNCITRAL and cooperating entities had issued to support the better understanding of its texts on dispute settlement: guides on the New York Convention, the *2012 Digest of Case Law on the Model Law on Arbitration* and the ASA toolbox for promoting the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings.[98]

410. Participants at the Congress had then considered the issue of implementing the United Nations Sales Convention and had discussed aspects of promoting the adoption, use and uniform interpretation of that Convention. At a general level, it had been indicated that a dynamic interpretation of the Convention was necessary to ensure its continuing relevance for evolving business practices. It had been noted that a number of existing legal mechanisms promoted that dynamic interpretation, but that more specific guidance, possibly in the form of a model law, could also be beneficial. A case study had examined issues related to the possible adoption of the Convention at the national level, and had concluded that the provisions of the Convention were generally compatible with all legal traditions and economic systems, and should therefore be adopted universally.

411. Another case study had highlighted the influence of certain fundamental notions of the Convention on the development of contract law at the national level, suggesting that smaller jurisdictions might be more open to the influence of uniform and international law texts. Other suggestions had been to fill gaps in legal education at the undergraduate level and to develop rules and practices specific to cross-border sales and not strictly connected with national law. Yet another participant had stressed the importance of extending the number of languages in which guidance on the United Nations Sales Convention was available, to the benefit of legal actors, commercial operators and, in particular, small and medium-sized enterprises that were unaware of contractual agreements in foreign languages and under foreign law.

412. At the penultimate session, the challenges of keeping UNCITRAL texts up to date had been considered, using public procurement and public-private partnerships as an example. The challenges of working in a dynamic area of law (common to most UNCITRAL topics), the amount of time necessary to develop an UNCITRAL legislative text and the importance of evaluating the effectiveness of those texts in practice had all been highlighted. Participants had highlighted areas of possible improvement in the UNCITRAL Model Law on Public Procurement to reflect new developments, and had discussed whether or not they indicated that the Model Law

[98] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 159-160.

itself should be amended. The risks of reopening issues that had proved challenging in achieving consensus, of some States seeking to impose their solutions (echoing comments made earlier in the Congress) and the benefits of complementing texts through providing supplemental materials, up-to-date guidance and interpretation had all been noted. Examples of the use of the Model Law in practice had been recognized as underscoring the need to take into account experience in regional reform and when enacting the text domestically when seeking to harmonize systems worldwide. No easy answers had been found to the questions of how to preserve the UNCITRAL knowledge base when working groups completed their work, although the potential to harness modern technology to preserve discussion and continuity had been raised.

413. During the final session, participants had considered the coordination and cooperation function of UNCITRAL, and how knowledge-gathering and knowledge dissemination could be enhanced through more in-depth and systematized cooperation, despite the different structures, membership and working modalities of the rule-formulating agencies. It had been noted that they all faced a common challenge: persuading the intended beneficiaries of their work of its value, since none had enforcement power.

414. The importance of legal infrastructure on trade and investment at the regional level by reference to the Asia-Pacific region had been highlighted, and the Congress had heard about the variety of international models used and their benefits for the region and events improving the understanding of those models. The potential of the Global Legal Information Network a multilingual and worldwide resource tool for the assimilation of laws — had also been discussed, and participants had been urged to support and raise awareness of the Network.

415. The panel had discussed various mechanisms to disseminate and preserve the value of the work of UNICTRAL, and concluded that one of them, discussed for some time in UNCITRAL circles, would be for UNCITRAL to survey and report annually on international, regional and some domestic reforms in international trade law in an annual publication.

416. In closing the Congress, the Secretary of UNCITRAL had thanked all the participants for their commitment and enthusiasm and had encouraged further study of the new concepts in international commerce that had been discussed during the Congress, the discussions of how existing solutions and instruments might already meet many new challenges, and the conclusion that wider promotion and adoption would further contribute to the successes of UNCITRAL. He had been pleased to hear the widespread view that the Commission had a major and exciting role to play in the years to come.

417. The Commission had also heard that other events were organized in connection with the Congress. The first was a side event on contractual networks, organized by Italy to provide an overview of its proposal for consideration by Commission at its current session (A/CN.9/925; see chapter XVII below) regarding possible future work by UNCITRAL on contractual networks. At that event, the main features of a contractual network, which could be considered as bridging the gap between contract law and company law, had been briefly outlined, and representatives of the private sector in Italy had provided examples of contractual networks intended to facilitate the internationalization of local businesses, mainly micro, small and medium-sized enterprises. In that regard, the success story of a contractual network aiming to

facilitate access by Italian businesses to the Indian market and establish partnerships with local businesses had been presented in detail.

418. The topics of other side events had been "Integrating sustainability considerations into international commercial law reform" (such as inclusive competitiveness and access to global supply chains, the business and human rights legal framework in the UNCITRAL context and environmental issues, climate change and UNCITRAL texts) and "The potential contribution of the digital economy to the sustainability agenda" (including free flow of information and implications for UNCITRAL works on e-commerce, uniform law on electronic contracts as a step forward in the elimination of barriers in electronic commerce and improving cooperation in cross-border insolvency issues by means of blockchain technology).

419. The Commission welcomed the report of the Congress and congratulated UNCITRAL on the event. The structure and breadth of the sessions, it was noted, had enabled an enriching discussion that would benefit the participants, and future deliberations in UNCITRAL.

420. The Commission requested the Secretariat to prepare and publish the proceedings of the Congress and selected materials presented for consideration at the Congress.

XVI. Role of UNCITRAL in promoting the rule of law at the national and international levels

A. Introduction

421. The Commission recalled that the item on the role of UNCITRAL in promoting the rule of law at the national and international levels had been on the agenda of the Commission since its forty-first session, in 2008,[99] in response to the General Assembly's invitation to the Commission to comment, in its report to the Assembly, on the Commission's current role in promoting the rule of law.[100] The Commission further recalled that, since that session, the Commission, in its annual reports to the General Assembly, had transmitted comments on its role in promoting the rule of law at the national and international levels, including in the context of post-conflict reconstruction. It had expressed its conviction that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United

[99] For the decision of the Commission to include the item on its agenda, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part two, para. 113.

[100] General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; 67/97, para. 14; 68/116, para. 14; 69/123, para. 17; and 70/118, para. 20.

Nations to promote the rule of law at the national and international levels.[101] That view had been endorsed by the General Assembly.[102]

422. At its fiftieth session, the Commission took note of General Assembly resolution 71/148, on the rule of law at the national and international levels, in paragraph 22 of which the General Assembly invited the Commission to continue to comment, in its reports to the General Assembly, on its current role in promoting the rule of law. The Commission decided to focus its comments to the General Assembly on ways and means to further disseminate international law to strengthen the rule of law from the perspective of the areas of work of UNCITRAL, in line with paragraph 26 of that resolution. In formulating its comments to the General Assembly on the topic, the Commission was assisted by the views of experts summarized in section B below.

423. The Commission requested the Secretariat to consider informing the Commission in writing about relevant developments related to topics on which the Commission would be expected to provide comments to the General Assembly under the agenda item at future sessions.

424. The Commission heard a statement about role of UNCITRAL in promoting the rule of law. Reference was made in particular to its work towards enhancing the effectiveness of settlement of international and regional commercial disputes, compiling best practices and ensuring acceptance and uniform interpretation of international commercial law. The importance of the transparency, objectivity and inclusiveness of the Commission was considered to be a major contributor to its continued success in strengthening the rule of law at the national and international levels.

B. Summary of experts' views

425. Experts shared experiences regarding the dissemination of international commercial law in the national, bilateral, regional and international contexts, highlighting the role of State and non-State institutions in that respect. The role of national legislators in using international commercial law while implementing national commercial law reform and the role of judges in applying and interpreting international commercial law in a uniform way were highlighted in particular.

426. Specific reference was made to the importance of outreach in dissemination activities to micro, small and medium-sized enterprises, as they often lacked access to professional legal advice and faced difficulties in ensuring the contractual balance

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[101] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 419; ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 334; ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 320; ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 195; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 267; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 215; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 294 and 318; and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 303.

[102] General Assembly resolutions 63/120, para. 11; 64/111, para. 14; 65/21, para. 12; 66/94, para. 15; 67/89, para. 16; 68/106, para. 12; 69/115, para. 12; 70/115, para. 11; and 71/135, para. 13.

and the need to cut transaction costs to stay competitive. Means of dissemination of international contract law to that particular audience could include model contracts for small firms or standard clauses based on internationally accepted standards and their translation into local languages by chambers of commerce or other professional associations.

427. The speakers were unanimous in underscoring the role of education for all relevant actors, in particular youth and legal practitioners, on international commercial law. Organization of courses, training sessions and other similar events, such as Vis Moot competitions, and reviews of international commercial law developments in publications, were considered traditional but still very effective and indispensable ways of disseminating international commercial law. The relevance of CLOUT and digests to judicial training was emphasized.

428. Specific examples were provided on the use of UNCITRAL texts in technical assistance, legal diagnostics, ranking, benchmarking, assessment methodologies and similar tools implemented by multilateral institutions in partnerships with UNCITRAL. UNCITRAL partners in those activities valued UNCITRAL texts, model laws in particular, for provisions readily transposable to national legislation and for verifiable targets for policy implementation.

429. The Commission was also informed about recent examples of UNCITRAL texts being used to devise information technology solutions for implementing commercial law reform, in particular electronic public procurement portals. The dialogue established between the legal and information technology communities through the EBRD UNCITRAL Public Procurement Initiative[103] helped to explain to developers of those solutions policy considerations embedded in the 2011 UNCITRAL Model Law on Public Procurement. As a result, transparency standards of the Model Law were expected to underlie the Open Contracting Data Standard[104] used globally for electronic public procurement. The value of the Model Law was also highlighted in the context of accession by States to the WTO Agreement on Government Procurement and implementation of regional instruments in the area of public procurement.

430. The Commission was also informed about current trends in legal research technology and challenges faced by international intergovernmental organizations in adopting them. Examples of information technology-based solutions employed by Governments and private entities for expediting legal research, including cross-border research, facilitating contract drafting and achieving consistent results in jurisprudence were provided.

431. The lack of financial and human resources, in particular dedicated information technology resources, and long-term budget sustainability were cited as the main challenges faced by international intergovernmental organizations in becoming innovative developers of legal research technology. The need to adhere to the principle of multilingualism made the implementation of innovative solutions in the United Nations system particularly difficult.

432. The digital divide was cited as another major challenge faced by a United Nations body that might be mandated to reach all jurisdictions or specifically target

[103] www.ppi-ebrd-uncitral.com.

[104] http://standard.open-contracting.org.

countries with no or limited Internet access or where most users used mobile devices. Without pre-existing commercial models that addressed the particular needs of that group of end users, development of a suitable solution by a United Nations body would require greater information technology expertise and costs.

433. The UNCITRAL partnership on the New York Convention Guide[105] was cited as an example of successful partnering of a United Nations body with external partners where the external partners provided resources and skills for information technology innovation while the UNCITRAL secretariat offered substantive expertise, reputation and the infrastructure to provide translations into six languages. There were, however, also examples of projects that had intended to be international in outreach but had subsequently failed, producing a significant negative impact on end users and jeopardising their trust in future similar projects. Any partnership or project with external partners would thus need to address reputational risks, issues of long-term sustainability or at least preservation and a mechanism for perpetual access and ownership by a United Nations body.

434. The Commission expressed appreciation to experts for their valuable input to the discussion of that agenda item and requested the Secretariat to reflect the main points made by experts in the report of the Commission.

C. UNCITRAL comments to the General Assembly

435. The Commission recalled that collection and dissemination of information concerning international trade law was listed among the functions of UNCITRAL in General Assembly resolution 2205 (XXI) and, at its first session, had been envisaged as a permanent aspect of the work of the Commission, in particular to avoid wasteful duplication of effort and of result and to ensure effective coordination among all concerned.[106]

436. The Commission recognized that dissemination of international trade law, in addition to being a stand-alone function of UNCITRAL, was also inherently present in its other functions, such as the function of coordinating the work of organizations active in the field of international trade law and encouraging cooperation among them and the function of promoting wider use of UNCITRAL texts and their uniform interpretation and application. The Commission also considered that it made an important contribution to the dissemination of texts of other organizations that were of relevance to its work, in particular by endorsing them for use or adoption.

437. The Commission decided therefore to bring to the General Assembly's attention the deliberations and decisions at the current session under other agenda items of relevance to the topic (see chapters IX-XV and XVIII of the present report).

438. The Commission recognized the role of States, the General Assembly, international organizations invited to sessions of UNCITRAL, other UNCITRAL partners, UNCITRAL methods of work, documentation and publications in the

[105] http://newyorkconvention1958.org.

[106] *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), paras. 29 and 30.

[106] *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), paras. 29 and 30.

dissemination of international commercial law. The Commission also recognized the role of regular reviews of the work of UNCITRAL in the *Repertory of Practice of United Nations Organs*, the *United Nations Juridical Yearbook* and other United Nations and non-United Nations publications, and the importance of enhancing cooperation with academia, which the Commission had highlighted at its forty-fifth session, in 2012.[107]

439. The Commission expressed appreciation to the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law for reflecting international trade law within the framework of activities conducted under the Programme pursuant to the request made by UNCITRAL in its early years.

440. While recalling achievements in the dissemination of international commercial law, the Commission recognized the need for constant adaptation of its dissemination practices to new issues and requested the Secretariat to consider the improvements in its dissemination practices suggested at the Congress and by the experts (see section B above). A specific call was made for removing obstacles to innovative dissemination practices faced by the United Nations. The proliferation of online tools designed to assist with international commercial law reform but not representing internationally agreed commercial law standards was cited as a new challenge to the implementation of the UNCITRAL mandate.

441. The Commission reiterated the need for better integration of its work in the broader agenda of the United Nations. The Commission was of the view that achieving that result would in itself contribute to further dissemination of international commercial law to strengthen the rule of law. To that end, the Commission recommended that the Secretariat should take additional steps towards dissemination across the United Nations system, in particular to legal advisers, of the Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms, endorsed by the Commission at its 2016 session.[108]

XVII. Work programme of the Commission

442. The Commission recalled its agreement to reserve time for discussion of its overall work programme as a separate topic at each session, in order to facilitate the effective planning of its activities.[109]

443. The Commission took note of the documents prepared to assist its discussions on the topic (A/CN.9/911, the documents referred to therein and two proposals submitted separately, namely, A/CN.9/923 and A/CN.9/925).

[107] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 179-181.
[108] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 262 and annex II.
[109] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 310.

A. Current legislative programme

444. The Commission took note of the progress of its working groups as reported earlier in the session (see chapters III to VII of the present report), and confirmed the programme of current legislative activities as set out in table 1 of document A/CN.9/911.

B. Future legislative programme

445. Recalling the importance of a strategic approach to the allocation of resources to, inter alia, legislative development, and its role in setting the work programme of UNCITRAL, especially as regards the mandates of working groups, [110] the Commission recalled that it had considered proposals for possible future legislative development earlier in the session. It proceeded to review its provisional decisions on those proposals, as follows.[111]

446. As regards e-commerce, the Commission confirmed that Working Group IV should continue with its ongoing projects on the contractual aspects of cloud computing and on legal issues related to identity management and trust services (see also para. 127 above).

447. The Commission confirmed that Working Group III should undertake work on the possible reform of investor-State dispute settlement, including questions of concurrent proceedings in the field of investment arbitration and code of ethics in international arbitration. In so doing, the Working Group should identify and consider concerns regarding investor-State dispute settlement and whether reform was desirable; if so, it should develop solutions to be recommended to the Commission (see also para. 264 above).

448. As regards procurement and infrastructure development, the Commission confirmed that the Secretariat (with the assistance of experts) should continue to update and consolidate the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* and associated texts, and should report further to the Commission, with draft texts as appropriate, at its fifty-first session, in 2018. The Commission also decided not to include the question of suspension and debarment in its agenda for the time being. (See also paras. 273 and 274 above.)

449. As regards secured transactions, the Commission confirmed that a practice guide on the topic should be prepared to address contractual, transactional and regulatory issues arising in the context of secured transactions, as well as finance to micro-businesses, and referred that task to Working Group VI (see also para. 227 above).

450. The Commission also heard two further proposals for legislative development.

451. Firstly, the Government of Italy presented a proposal on possible future work on contractual networks (A/CN.9/925).

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[110] Ibid., paras. 294 and 295.

[111] See also table 2, entitled "Summary of mandated and possible future legislative activity", in document A/CN.9/911.

412. It was explained that the proposal sought to support the current work of Working Group I on business registration and the creation of a simplified business entity. The proposal envisaged research into ways to allow business activity prior to the creation of a legal personality and into the determination of corporate structure, allowing businesses to access credit and government facilities. The objective would be to allow such businesses to form networks and contract with larger companies in supply chains as a network. The proponents stated that the intention was to conduct further research to identify solutions, with initial results to be presented to the Commission at its fifty-first session, in 2018.

413. Support was expressed for the proposal as set out in document A/CN.9/925, recognizing the importance of the topic to micro, small and medium-sized enterprises in particular, and it was suggested that Working Group I could undertake the research set out in the proposal.

414. An alternative view was that, while the proposal was supported in principle, it was not currently appropriate to refer the work concerned to Working Group I. In support of that view, it was stated that further study and a consideration of the many questions that the proposal raised should first be undertaken, and that the solutions should not necessarily be confined to micro, small and medium-sized enterprises (and consequently, if referred to a working group, need not be undertaken necessarily by Working Group I).

415. The Commission expressed its thanks to the Government of Italy for the proposal. It also welcomed the willingness of the proponents to conduct additional research to develop the proposal further, so that it could come before the Commission in 2018 for decisions on whether the work should go forward and, if so, in what capacity.

416. CMI presented a proposal on possible future work on cross-border issues related to the judicial sale of ships (A/CN.9/923).

417. The proponents explained the nature of judicial sales addressed in the proposal, and issues that were preventing the transfer of vessels with clean title. Recalling that over 95 per cent of world trade took place using transport by sea and that, in current times of financial difficulty, there were increasing failures by ship owners, unable to obtain additional financing, to pay debts as they fell due. In addition, the scale and worldwide nature of the concerns were highlighted.

418. It was explained that a variety of debts would arise as a result of the operation of a ship, and that non-payment thereof would give rise to maritime claims that enabled creditors to arrest a vessel for non-payment, with an eventual order for judicial sale of the vessel. The outcome of such a sale should be to transfer clean title to the purchaser of the vessel, but in some jurisdictions, courts did not recognize and enforce that outcome when the order for the judicial sale emanated from another jurisdiction. The consequences of that failure included difficulties for the purchaser in re-registering such vessels and trading freely with them, as well as the exposure of such purchasers to claims against prior owners for undisclosed liabilities. The risks of a failure to obtain clean title depressed the price fetched by vessels through judicial sale by as much as half their value and led to a cascading set of problems in a number of sectors, including reluctance by financial institutions to lend, lower repayments to creditors and an inability for ship owners to obtain funding. Those problems resulted

in serious loss in economic value and a reduction in the state and maintenance of the world fleet.

459. The proponents also explained that a short, self-contained instrument along the lines of the New York Convention could provide a solution to those issues. In essence, it would ensure that prior claimants would look to ship sale proceeds and previous ship owners to settle their claims, and clean title to vessels would be transferred and recognized across borders.

460. It was observed, in considering the proposal, that the concerns were highly relevant to UNCITRAL and to world trade. The pernicious consequences of the current situation included the hindering of the flow of cargo, the destruction of value and assets and unnecessary legal action, which compromised the industry and world trade because vessels unable to trade clogged ports. For all those reasons, and those set out in document A/CN.9/923, UNCITRAL was requested to take up the proposal.

461. A view was expressed that the proposal might be better addressed in an organization specializing in maritime matters, such as the International Maritime Organization (IMO). The view was further expressed that the problem, while a legitimate concern, might not have broad enough support from enough States in UNCITRAL and that it should not be taken up by a working group at the present time in the light of the full complement of issues currently assigned to those groups.

462. It was recalled that CMI had also presented its proposal to IMO and the Hague Conference on Private International Law, but that neither organization had placed it on its work programme. However, CMI had been invited to present additional information in respect of the matter for possible future discussion in those organizations in due course.

463. There was support for the view that UNCITRAL was well placed to resolve the private international law issues raised by the proposal in a technical and non-politicized environment and it was observed that, in discussions at the Hague Conference on Private International Law, a number of delegations had expressed the view that the proposal would be best taken up by UNCITRAL. It was also considered doubtful that the proposal fell within the mandate of IMO, given its focus on public international law and on more technical issues relating to safety and the protection of the environment.

464. A number of delegations supported the proposal and expressed their interest in taking it up, subject to the availability of working group resources and any necessary consultation with other organizations. While swift resolution of the questions raised by the proposal was encouraged, the Commission agreed that additional information in respect of the breadth of the problem would be useful and that the proposal could be reconsidered by the Commission at a future session. It was therefore suggested that CMI might seek to develop and advance the proposal by holding a colloquium so as to provide additional information to the Commission and allow it to take an informed decision in due course.

465. The Commission thanked CMI for its proposal and noted the importance of the issues raised. It decided not to refer the proposal to a working group at the present time but agreed that UNCITRAL, through its secretariat, and States would support and participate in a colloquium to be initiated by CMI to discuss and advance the proposal. The Commission agreed to revisit the matter at a future session.

C. Current and possible future activities to support the adoption and use of UNCITRAL texts (support activities)

466. The Commission recalled the importance of support activities and the need to encourage such activities at the global and regional levels through the Secretariat, through the expertise available in the working groups and the Commission, through member States and through partnering arrangements with relevant international organizations. It also recalled the importance of promoting increased awareness of UNCITRAL texts among those organizations and within the United Nations system.[112]

467. The Commission took note of the reports on support activities before it at its current session (listed in document A/CN.9/911), notably technical cooperation and assistance activities undertaken by the Secretariat, including through the UNCITRAL website; the promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts; and coordination activities (A/CN.9/905, A/CN.9/906 and A/CN.9/908).

468. In concluding the agenda item, it was emphasized that all the above-mentioned activities should be undertaken taking into account the extent of the resources available to the Secretariat.

XVIII. Relevant General Assembly resolutions

469. The Commission took note of General Assembly resolutions 71/135, on the report of UNCITRAL on the work of its forty-ninth session, 71/136, on the UNCITRAL Model Law on Secured Transactions, 71/137, on the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, and 71/138, on the Technical Notes on Online Dispute Resolution, adopted upon the recommendation of the Sixth Committee.

XIX. Other business

A. Internship programme

470. The Commission recalled the considerations taken by its secretariat in selecting candidates for internships and noted with satisfaction the continuing positive implications of changes introduced in 2013 and 2014 in the United Nations internship programme (selection procedures and eligibility requirements) on the pool of eligible and qualified candidates for internships from underrepresented countries, regions and language groups.[113]

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[112] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 263-265.

[113] See also ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 328-330; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 343 and 344; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 277 and 278; ibid., *Seventieth Session, Supplement No. 17* (A/70/17, paras. 371 and 372); and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 378 and 379.

471. The Commission was informed that, since the Secretariat's oral report to the Commission at its forty-ninth session, in July 2016, 19 new interns had undertaken an internship with the UNCITRAL secretariat in Vienna. Most of them had come from developing countries and countries in transition, with two coming from the least developed countries.

472. The Commission was informed, however, that the large majority of applications were received from the Group of Western European and other States. In particular, the Secretariat faced difficulties in attracting candidates from Africa and Latin America and candidates with fluent Arabic language skills.

473. States and observer organizations were requested to bring the possibility of applying for internships at the UNCITRAL secretariat to the attention of interested persons who met those specific requirements. Taking into account that internships at the United Nations were unpaid, States and observer organizations were invited to consider granting scholarships to potential interns.

B. Evaluation of the role of the Secretariat in facilitating the work of the Commission

474. The Commission recalled that, at its fortieth session, in 2007,[114] it had been informed of the programme budget for the biennium 2008-2009, which had listed "facilitating the work of UNCITRAL" among the expected accomplishments of the Secretariat. The performance measure for that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[115] At that session, the Commission had agreed to provide feedback to the Secretariat.

475. The Commission was informed that the request for evaluation of the role of the Secretariat in servicing UNCITRAL since the start of its forty-ninth session (27 June 2016) had elicited 14 responses, and that the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat, as indicated in those responses, remained generally high (seven States had given 5 out of 5, four States had given 4 out of 5, two States had given 3 out of 5, and one State had given 1 out of 5).

476. The Commission took note of the concern that the level of responses to the request for evaluation remained low and that it was essential to receive feedback, for budgetary and other purposes, about the UNCITRAL secretariat's performance from more States for a more objective evaluation of the role of the Secretariat.

477. The Commission expressed its appreciation to the Secretariat for its work in servicing UNCITRAL.

C. Methods of work

478. Delegates recalled their statements regarding scheduling of agenda items, in particular agenda item 21, made upon the adoption of the agenda of the session (see para. 12 above). In addition, it was suggested that clustering related issues and

[114] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 243.

[115] A/62/6 (Sect. 8) and Corr.1, table 8.19 (*d*).

consolidating items on possible future work on which the decision of the entire Commission, rather than experts in a particular field, was required, would help in better organizing UNCITRAL sessions.

479. The Secretariat was requested to seek the views of States on the draft provisional agenda as early as possible before the next UNCITRAL session. It was understood that, in finalizing the provisional agenda, the Secretariat would seek to take those comments into account.

480. Delegates also recalled statements made under other agenda items requesting the Secretariat not to repeat in their oral reports to the Commission the content included in the Secretariat's written reports to the Commission and to replace, as and where appropriate, in particular, regarding agenda items 11 (c) and 12, oral reports by the Secretariat with written reports to be issued before the session (see also paras. 364 and 423 above). A view was expressed that written reports would facilitate consultations on important issues within and among States before the session. However, it was generally felt that it should be left to the Secretariat to achieve the right balance between written and oral methods of communication of necessary information to the Commission.

481. The view was also expressed that States should have confidence in the Secretariat's ability to organize UNCITRAL sessions in the best way, taking into account various considerations. The extensive experience of the Secretariat in the organization of UNCITRAL meetings and its ability to reconcile various competing considerations was emphasized.

D. Retirement of the Secretary of UNCITRAL and other long-serving members of the UNCITRAL secretariat

482. The Commission noted that its Secretary, Renaud Sorieul, having reached the age of retirement, was scheduled to leave the United Nations Secretariat on 31 October 2017. Mr. Sorieul had served as a member of the Secretariat since 1989 and as Secretary of the Commission and Director of the International Trade Law Division of the Office of Legal Affairs since 2008. The Commission saluted Mr. Sorieul's major contribution to achieving the goals of UNCITRAL, which, as had been stated by the General Assembly, was the core legal body within the United Nations system in the field of international trade law. It was acknowledged that Mr. Sorieul had strongly supported the work of the Commission and had built enduring foundations for its ongoing projects and future endeavours. The time during which Mr. Sorieul had served as Secretary of the Commission had been a most productive one and, under his leadership, the secretariat of the Commission had made essential contributions to that work, despite the limited resources available to it. The Commission expressed its appreciation to Mr. Sorieul for his 28 years of exemplary United Nations service, for his outstanding contribution to the process of modernization, unification and harmonization of international trade law, and for his efforts towards expanding the presence of UNCITRAL around the world.

483. The Commission also took note of the retirement of two long-standing members of its secretariat, Mr. Timothy Lemay, Principal Legal Officer, and Mr. Spyridon Bazinas, Senior Legal Officer. The Commission expressed its appreciation to those

two staff members for their essential support to the activities of UNCITRAL and its secretariat.

XX. Date and place of future meetings

484. At its thirty-sixth session, in 2003, the Commission had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[116] At the current session, the Commission noted that all working groups would meet for two one-week sessions before its fifty-first session, in 2018, except for Working Group IV (Electronic Commerce), which would meet only for one one-week session that would take place in New York in the first half of 2018.

485. The Commission took note of General Assembly resolutions on the pattern of conferences promulgating policies as regards six significant holidays (Orthodox Good Friday, Yom Kippur, the Day of Vesak, Diwali, Gurpurab and Orthodox Christmas), on which the United Nations Headquarters and the Vienna International Centre remained open but United Nations bodies were invited to avoid holding meetings. The Commission noted that the policies had become effective at United Nations Headquarters on 1 January 2017 and would become effective at the Vienna International Centre on 1 January 2018. Accordingly, dates proposed by the Secretariat for sessions of UNCITRAL working groups in the second half of 2017 in Vienna were not affected by those policies. The Commission agreed to take into account those policies as far as possible when considering the dates of its future meetings.

A. Fifty-first session of the Commission

486. The Commission approved the holding of its fifty-first session in New York from 25 June to 13 July 2018 (it was noted that the United Nations Headquarters would be closed on 4 July 2018). The Secretariat was requested to consider shortening the duration of the session by one week if the expected workload of the session would justify doing so.

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[116] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

B. Sessions of working groups

1. Sessions of working groups between the fiftieth and fifty-first sessions of the Commission

487. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Micro, Small and Medium-sized Enterprises) would hold its twenty-ninth session in Vienna, from 16 to 20 October 2017, and the thirtieth session in New York, from12 to 16 March 2018;

(b) Working Group II (Dispute Settlement) would hold its sixty-seventh session in Vienna, from 2 to 6 October 2017, and its sixty-eighth session in New York, from 5 to 9 February 2018;

(c) Working Group III (Investor-State Dispute Settlement Reform) would hold its thirty-fourth session in Vienna, from 27 November to 1 December 2017, and its thirty-fifth session in New York, from 23 to 27 April 2018;

(d) Working Group IV (Electronic Commerce) would hold its fifty-sixth session in New York, from 16 to 20 April 2018;

(e) Working Group V (Insolvency Law) would hold its fifty-second session in Vienna, from 18 to 22 December 2017, and its fifty-third session in New York, from 7 to 11 May 2018;

(f) Working Group VI (Security Interests) would hold its thirty-second session in Vienna, from 11 to 15 December 2017, and its thirty-third session in New York, from 30 April to 4 May 2018.

488. The Commission noted that two remaining days of reserved conference services for UNCITRAL in Vienna in 2017 would be used for an expert meeting on public-private partnerships (see chapter VIII above).

489. The Secretariat was requested to inform States about changes in the dates of sessions announced in the provisional agenda sufficiently in advance to allow consultation with States' representatives in affected working groups.

2. Sessions of working groups in 2018 after the fifty-first session of the Commission

490. The Commission noted that the following tentative arrangements had been made for working group meetings in 2018 after its fifty-first session, subject to the approval by the Commission at that session, and that those dates included Gurpurab (23 November 2018). The Commission requested the Secretariat to explore whether an alternative week in the second half of 2018 could be found for a session of Working Group IV (Electronic Commerce) in Vienna that would not include a significant holiday, and decided to consider the matter further at its next session:

(a) Working Group I (Micro, Small and Medium-sized Enterprises) would hold its thirty-first session in Vienna from 24 to 28 September 2018;

(b) Working Group II (Dispute Settlement) would hold its sixty-ninth session in Vienna from 10 to 14 September 2018;

(c) Working Group III (Investor-State Dispute Settlement Reform) would hold its thirty-sixth session in Vienna, from 8 to 12 October 2018;

(d) Working Group IV (Electronic Commerce) would hold its fifty-seventh session in Vienna from 19 to 23 November 2018;

(e) Working Group V (Insolvency Law) would hold its fifty-fourth session in Vienna from 10 to 14 December 2018;

(f) Working Group VI (Security Interests) would hold its thirty-fourth session in Vienna from 26 to 30 November 2018.

Annex I

UNCITRAL Model Law on Electronic Transferable Records

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. This Law applies to electronic transferable records.

2. Other than as provided for in this Law, nothing in this Law affects the application to an electronic transferable record of any rule of law governing a transferable document or instrument including any rule of law applicable to consumer protection.

3. This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to [...].[1]

Article 2. Definitions

For the purposes of this Law:

"*Electronic record*" means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not;

"*Electronic transferable record*" is an electronic record that complies with the requirements of article 10;

"*Transferable document or instrument*" means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.

Article 3. Interpretation

1. This Law is derived from a model law of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

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[1] The enacting jurisdiction may consider including a reference to: (a) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (b) documents and instruments falling under the scope of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931); and (c) electronic transferable records existing only in electronic form.

Article 4. Party autonomy and privity of contract

1. The parties may derogate from or vary by agreement the following provisions of this Law: [...].[2]

2. Such an agreement does not affect the rights of any person that is not a party to that agreement.

Article 5. Information requirements

Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard.

Article 6. Additional information in electronic transferable records

Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a transferable document or instrument.

Article 7. Legal recognition of an electronic transferable record

1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

2. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.

3. The consent of a person to use an electronic transferable record may be inferred from the person's conduct.

CHAPTER II. PROVISIONS ON FUNCTIONAL EQUIVALENCE

Article 8. Writing

Where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference.

Article 9. Signature

Where the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record.

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[2] The enacting jurisdiction may consider which provisions of the Model Law, if any, the parties may derogate from or vary by agreement.

Article 10. Transferable documents or instruments

1. Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:

(a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and

(b) A reliable method is used:

(i) To identify that electronic record as the electronic transferable record;

(ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and

(iii) To retain the integrity of that electronic record.

2. The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any authorized change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display.

Article 11. Control

1. Where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

(a) To establish exclusive control of that electronic transferable record by a person; and

(b) To identify that person as the person in control.

2. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record.

CHAPTER III. USE OF ELECTRONIC TRANSFERABLE RECORDS

Article 12. General reliability standard

For the purposes of articles 9, 10, 11, 13, 16, 17 and 18, the method referred to shall be:

(a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, which may include:

(i) Any operational rules relevant to the assessment of reliability;

(ii) The assurance of data integrity;

(iii) The ability to prevent unauthorized access to and use of the system;

(iv) The security of hardware and software;

(v) The regularity and extent of audit by an independent body;

(vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(vii) Any applicable industry standard; or

(b) Proven in fact to have fulfilled the function by itself or together with further evidence.

Article 13. Indication of time and place in electronic transferable records

Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record.

Article 14. Place of business

1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country.

Article 15. Endorsement

Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9.

Article 16. Amendment

Where the law requires or permits the amendment of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used for amendment of information in the electronic transferable record so that the amended information is identified as such.

Article 17. Replacement of a transferable document or instrument with an electronic transferable record

1. An electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used.

2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the electronic transferable record.

3. Upon issuance of the electronic transferable record in accordance with paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

Article 18. Replacement of an electronic transferable record with a transferable document or instrument

1. A transferable document or instrument may replace an electronic transferable record if a reliable method for the change of medium is used.

2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the transferable document or instrument.

3. Upon issuance of the transferable document or instrument in accordance with paragraphs 1 and 2, the electronic transferable record shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

CHAPTER IV. CROSS-BORDER RECOGNITION OF ELECTRONIC TRANSFERABLE RECORDS

Article 19. Non-discrimination of foreign electronic transferable records

1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad.

2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument.

Annex II

List of documents before the Commission at its fiftieth session

Symbol	*Title or description*
A/CN.9/894	Provisional agenda, annotations thereto and scheduling of meetings of the fiftieth session
A/CN.9/895	Report of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its twenty-seventh session
A/CN.9/896	Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session
A/CN.9/897	Report of Working Group IV (Electronic Commerce) on the work of its fifty-fourth session
A/CN.9/898	Report of Working Group V (Insolvency Law) on the work of its fiftieth session
A/CN.9/899	Report of Working Group VI (Security Interests) on the work of its thirtieth session
A/CN.9/900	Report of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its twenty-eighth session
A/CN.9/901	Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session
A/CN.9/902	Report of Working Group IV (Electronic Commerce) on the work of its fifty-fifth session
A/CN.9/903	Report of Working Group V (Insolvency Law) on the work of its fifty-first session
A/CN.9/904	Report of Working Group VI (Security Interests) on the work of its thirty-first session
A/CN.9/905	Technical cooperation and assistance
A/CN.9/906	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/907	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/908	Coordination activities
A/CN.9/909	Status of conventions and model laws
A/CN.9/910	UNCITRAL regional presence: activities of the UNCITRAL Regional Centre for Asia and the Pacific

A/CN.9/911	Work programme of the Commission
A/CN.9/912	Possible future work in procurement and infrastructure development
A/CN.9/913	Possible future legislative work on security interests and related topics
A/CN.9/914 and Adds.1-6	Draft guide to enactment of the UNCITRAL Model Law on Secured Transactions
A/CN.9/915	Possible future work in the field of dispute settlement: concurrent proceedings in international arbitration
A/CN.9/916	Possible future work in the field of dispute settlement: ethics in international arbitration
A/CN.9/917	Possible future work in the field of dispute settlement: reforms of investor-State dispute settlement
A/CN.9/918 and Adds.1-9	Settlement of commercial disputes: investor-State dispute settlement framework — compilation of comments
A/CN.9/919	Endorsement of texts of other organizations: International Chamber of Commerce Uniform Rules for Forfaiting
A/CN.9/920	Draft model law on electronic transferable records with explanatory notes
A/CN.9/921 and Adds.1-3	Draft model law on electronic transferable records: compilation of comments by Governments and international organizations
A/CN.9/922	Draft model law on electronic transferable records with explanatory notes: proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission
A/CN.9/923	Proposal of the Comité Maritime International for possible future work on cross-border issues related to the judicial sale of ships
A/CN.9/924	Possible future coordination and technical assistance work on security interests and related topics
A/CN.9/925	Possible future work by UNCITRAL on contractual networks: proposal of the Government of Italy
A/CN.9/926	Possible future work on security interests: proposal for a practice guide to the UNCITRAL Model Law on Secured Transactions — proposal of the Governments of Australia, Canada, Japan and the United Kingdom of Great Britain and Northern Ireland